
**JUSTICE OF THE PEACE AND LOCAL
GOVERNMENT REVIEW REPORTS
1969. 133 J.P.**

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JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW REPORTS, 1969

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1. Adoption order; consent of mother dispensed with because she could not be found; application by mother for extension of time to appeal; inherent jurisdiction of Court of Appeal to grant extension of time and to remit case for re-hearing.—Where the court has dispensed with the consent to an adoption order of a mother on the ground that she could not be found and the order has become final, the Court of Appeal has an inherent jurisdiction to grant an extension of time for the mother to appeal, to set aside the adoption order, and to remit the matter for re-hearing on oral evidence. Extension of time for appealing against an adoption order would only be granted in very exceptional circumstances. (*Re F (R)* (an infant). C.A. (Civ. Div.)) 743
2. Illegitimate child; application by mother and her husband; opposition by putative father; advantage to child of ceasing to be illegitimate outweighing loss of connexion with real father.—A single girl aged about 18 gave birth to a boy in October, 1965. In February, 1966, a magistrates' court made an affiliation order in her favour and ordered that the father should have access to the child for two hours each Sunday morning. The father was a devoted father, saw the child each week, and asked the mother to marry him. She refused, and, in August, 1967, married another man. The child thereafter lived with, and was brought up by, the mother and her husband. Later they had a child of their own. In January, 1968, the mother and her husband applied to adopt the boy. The father opposed the application, and, in March, 1968, applied under the Guardianship of Infants Acts, 1886 and 1925, for custody of the boy. The father did not question the suitability of the would-be adopter, but he wished to maintain connexion with his child and to attend to his education:—*Held*: the advantages for the child of being adopted, and thereby ceasing to be illegitimate, outweighed the loss of his connexion with his real father, and, therefore, an adoption order should be made and the application for custody dismissed. (*Re E (P)* (an infant). C.A. (Civ. Div.)) 137

ALIENS

1. Breach of landing condition; power to order defendant to enter into recognizance to leave United Kingdom; Aliens Restriction Act, 1914 s. 1 (2); Aliens Order, 1953, art. 26 (2).—By the Aliens Restriction Act, 1914, s. 1 (2), a person who fails to comply with any provision of the subsection (now reproduced by art. 26 (1) of the Aliens Order, 1953) is liable on conviction to a fine or imprisonment, and, in addition, the court before which he is convicted may require him to enter into recognizances to comply with the provisions of the order. On August 5, 1968, the applicant pleaded guilty to a charge of "being an alien, namely a Dutch citizen, who having attained the age of 16 years and in whose case there was in force a landing condition requiring [him] to leave the United Kingdom by midnight on July 18, 1968, did fail to comply with this condition, and on July 25, 1968, was unlawfully at large in the United Kingdom, contrary to art. 1 (1), art. 5 (5) and art. 25 (1) of the Aliens Order, 1953". The justices fined him £20 and ordered him to enter into a recognizance to leave the United Kingdom within seven days. Subsequently the applicant's passport was endorsed by the Home Office extending his period of stay in the United Kingdom till August 12, 1968. An application for a further extension was still under consideration:—*Held*: the order of 1953 did not contain any provision requiring an alien who had committed an offence against the order to

ALIENS—continued

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- leave the United Kingdom, and, accordingly, the justices had no power to order the applicant to enter into the recognizance, and *certiorari* must issue to quash that part of their determination. (*R. v. East Grinstead Justices. Ex parte Doeve. Q.B.D.*) 35
2. Leave to land; extension of period of stay; refusal; public policy; natural justice.—The plaintiffs were aliens and students at the H College of Scientology. They were granted permits for a limited stay in the United Kingdom for the purpose of full time study at a recognized educational establishment. Their application for an extension of time for the purpose of continuing the study at the H College was refused by the Home Secretary on the ground that it was his declared policy not to grant any extension of time for the purpose of study at that college. The plaintiffs instituted proceedings claiming a declaration that the decision was void because the Home Secretary had not considered their applications on their merits. On the Home Secretary's application the plaintiffs' statement of claim was struck out as disclosing no reasonable cause of action and being an abuse of the process of the court. On appeal:—*Held*: (RUSSELL, L. J., dissenting): an alien had no right to enter the United Kingdom without leave, and, having entered, to have the time extended, and could be refused permission to remain without reasons being given; accordingly, the plaintiffs having no right capable of being interfered with, no question of natural justice arose. *Per LORD DENNING, M.R.*: The Home Secretary may, in the honest exercise of his discretion, adopt a policy and announce it to those concerned, so long as in exceptional cases he will listen to reasons why it should not apply. (*Schmidt and Another v. Secretary of State for Home Affairs. C.A. (Civ. Div.)*) 274

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1. Betting; licensed betting office; user for purpose other than betting; private meeting after closing hours; Betting, Gaming and Lotteries Act, 1963, s. 10 (1), sch. 4, para. 1.—The words in para. 1 of sch. 4 to the Betting, Gaming and Lotteries Act, 1963, that premises licensed as a betting office "shall not be used for any purpose other than the effecting of betting transactions" mean that the premises must not be used at any time for such a purpose. Accordingly, where the licensee of a betting office used the office after closing hours for a private meeting of the local bookmakers' association:—*Held*: he had committed an offence against s. 10 (1) of the Act. (*Anderson v. Gradidge. Q.B.D.*) 368
2. Gaming; Kittyscoop; variant of roulette; equality of chances for all players; Betting, Gaming and Lotteries Act 1963, s. 32 (1) (a), (b).—The defendant owned and managed a bona fide social club, the main activity of which was the playing of bingo. In January, 1968, they introduced the game of kittyscoop as an amenity for members. The game was a variant of roulette, played by means of an ordinary roulette wheel on which six numbers in three pairs had been labelled "Kittyscoop". The zero on the wheel was effectively eliminated as a factor in the game. The odds offered against any of the six kittyscoop numbers winning was four to one. The equal odds were five to one, and accordingly the game operated in favour of the kittyscoop. Any member who wished to play was required to obtain a numbered ticket which entitled him to play for one session and he was charged a fee of £1 for the session. A float was provided by the club as a loan to the players at the commencement of each session. All moneys bid as stakes were paid into the kittyscoop and all winnings were paid out of the kittyscoop.

BETTING, GAMING AND LOTTERIES—continued

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At the end of a session, if any surplus remained, the club took from the pool sufficient money to reimburse itself for loans and to pay session fees owed by the players; any balance was distributed between the ticket holders, and, if there was a deficiency, the ticket holders were bound to make this up in equal proportions. Justices found the defendants guilty of being concerned in the management and organization of unlawful gaming contrary to s. 32 (4) of the Betting, Gaming and Lotteries Act, 1963, but the defendants appealed to quarter sessions who allowed the appeal. On an appeal to the High Court by the prosecutor:—*Held*: that the defendants had not discharged the burden of proof which, under s. 32 (1) (a) of the Betting, Gaming and Lotteries Act, 1963, was on them to show that the game was so conducted that the chances therein were equally favourable to all the players; the appeal must, therefore, be allowed and the conviction restored. (*I. & N. Weston, Ltd. v. Metropolitan Police Commissioner. Q.B.D.*)

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3. Gaming; unlawful gaming; roulette; chances not favourable to all players; money disposed of otherwise than by payment to player as winnings; Betting, Gaming and Lotteries Act, 1963, s. 32 (1) (a) (ii), (b). —By the Betting, Gaming and Lotteries Act, 1963, s. 32 (1): “. . . any gaming shall be lawful if, but only if, it is conducted in accordance with the following conditions, that is to say—(a) . . . (ii) the gaming is so conducted that the chances therein are equally favourable to all the players; and (b) that no money or money's worth which any of the players puts down as stakes, or pays by way of losses, or exchanges for



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BETTING, GAMING AND LOTTERIES—*continued*

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tokens used in playing the game, is disposed of otherwise than by payment to a player as winnings . . .” A gaming club paid to members of the club playing roulette, putting a stake on a single number, and winning, odds of 35 to 1 in “gaming chips”, which could be exchanged for money, and in addition sufficient “marker chips” to bring up the odds to 36 to 1. These “marker chips” could be exchanged for “gaming chips” or cash. Members were invited, but not compelled, to give back to the club any “marker chips” won by them, to the financial gain of the club. A majority of the members returned to the club some or all of the “marker chips” they had won.—*Held*: the gaming was unlawful as not complying with the conditions laid down in s. 32 (1) (a) (ii) or those in s. 32 (1) (b). Decision of the Divisional Court affirmed. (*Victoria Sporting Club, Ltd. and Another v. Hannan. H.L.*)

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4. Gaming; gaming machine; hiring to club; legality; weekly rent; guarantee by owner to hirers of specified profit; “application” of “stakes hazarded”; Betting, Gaming and Lotteries Act, 1963, s. 33 (2) (c), s. 54 (1).—By s. 33 of the Betting, Gaming and Lotteries Act, 1963: “(1) Section 32 of this Act shall not apply to gaming by means of a gaming machine, but, subject to the provisions of this Act, if any such gaming takes place on any premises to which, whether on payment or otherwise, the public have access, or which are used wholly or mainly by persons under the age of eighteen years, or, except in accordance with the conditions set out in subs. (2) of this section, on any other premises—(a) any person who knowingly allowed the premises to be used for the purpose of the gaming; and (b) any other person who, knowing or having reasonable cause to suspect that the premises would be used for such gaming—(i) caused or allowed the machine to be placed on the premises; or (ii) let the premises, or otherwise made the premises available, to any person by whom an offence in connexion with the gaming was committed, shall be guilty of an offence. (2) The conditions referred to in the foregoing subsection are—(a) that not more than two gaming machines are made available for play in any one building or, where different parts of a building are occupied by two or more different persons, in the part or parts of the building occupied by any one of those persons; and (b) that the stake required to be hazarded in order to play the game once does not exceed sixpence; and (c) that all stakes hazarded are applied either in the payment of winnings to a player of the game or for purposes other than private gain. (3) In this section—(a) the expression ‘gaming machine’ means a machine for playing a game of chance, being a game which requires no action by any player other than the actuation or manipulation of the machine; and (b) the expression ‘building’ includes the curtilage of the building.” By s. 54: “(1) In construing ss. 33, 37, 43 or 48 of this Act, proceeds of any entertainment, lottery, gaming or amusement promoted on behalf of a society to which this subsection extends which are applied for any purpose calculated to benefit the society as a whole shall not be held to be applied for purpose of private gain by reason only that their application for that purpose results in benefit to any person as an individual. (2) For the purposes of the said ss. 33, 37 and 48, where any payment falls to be made by way of a hiring, maintenance or other charge in respect of gaming machine within the meaning of the said s. 33 or in respect of any equipment for holding a lottery or gaming at any entertainment, then, if, but only, if, the amount of that charge falls to be determined wholly or partly by reference to the extent to which that or some other such machine or equipment is used for the purposes of lotteries or gaming, that payment shall be held to be an application of the stakes hazarded or proceeds of the entertainment, as the case may

BETTING, GAMING AND LOTTERIES—*continued*

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require, for purposes of private gain; and, accordingly, any reference in the said ss. 37 or 48 to expenses shall not include a reference to any such charge falling to be so determined. (3) Subsection (1) of this section extends to any society which is established and conducted either—(a) wholly for purposes other than purposes of any commercial undertaking; or (b) wholly or mainly for the purpose of participation in or support of athletic sports or athletic games; and in this section the expression 'society' includes any club, institution, organization or association of persons, by whatever name called, and any separate branch or section of such club, institution, organization or association." The appellant sued the respondents for damages for breach of contract in that they had refused to take delivery of two fruit machines in pursuance of a hiring agreement in writing between the parties dated July 25, 1965. The respondents admitted the agreement as a purported agreement and that they refused to take delivery of the fruit machines, but they pleaded that the purported agreement was illegal and void as containing provisions contravening the Betting, Gaming and Lotteries Act, 1963, and in particular s. 33 thereof. The respondents were a working men's club. Clause 1 of the agreement provided that the appellant (referred to as "the owner" or "the owners") should let and the respondents (referred to as "the hirer") should take on hire two fruit machines for a period of 36 calendar months commencing on August 1, 1965, at a rental of £12 per week payable in advance, and the hiring was to continue thereafter until the respondents gave not less than six months' notice of termination. Clause 2 provided that the appellant should maintain the machines in good working order and the respondents should pay to him by way of additional rent the sum of 2s. per week payable in advance for such maintenance. Clause 10 was in these terms: "The owners guarantee to the hirer that the earnings from fruit machines for the hirer shall be £1,900 per annum. Failing that the owners agree to pay to the hirer a certain sum of money that brings the total earnings of the hirer to £1,900 per annum. It is also agreed between the owners and the hirer that the owners shall not charge any rent for the machine to the hirer for the first six months and in return the owners will not be held responsible if the earnings of the fruit machines do not reach the guaranteed figures." There was also an oral agreement, made between the parties on the same day as the written agreement, that the appellant should retain the keys of the machines. He would thus be able to count the money coming out of the machines. On August 1, 1965, the appellant called with the machines and was met by officials of the respondents, who simply said that since the last time he had been there they had "changed their frame of mind" and would not accept the machines. He had bought two new machines for the purpose of supplying them to the respondents at a cost to him of some £600 and he was left with those two machines on his hands for some time. It was not until May, 1966, that he was able to place them elsewhere. As the respondents refused to take delivery of the machines, there was no performance of the hiring agreement:—*Held*: the "stakes hazarded" were "applied" within s. 33 (2) (c) partly in payment of winnings to successful players, the balance remaining, which was "proceeds" within s. 54 (1), not being "applied" to any purpose until it was used or allocated in some way; on that view of the meaning of "applied" the performance of the hiring agreement would not have involved any application of any part of the stakes hazarded for the private gain of the appellant, for, if there were any private gain to him, it would occur when the stakes hazarded became earnings of the respondents and so

BETTING, GAMING AND LOTTERIES—continued

reduced his liability under the guarantee, and the subsequent application of the money made no difference to his position; the application of the earnings for the general purposes of the respondents so as to benefit their members would, under s. 54 (1), not be reckoned as application for purposes of private gain; therefore, the performance of the hiring agreement would have complied with the conditions in s. 33 (2), and the agreement was not illegal or void. Decision of Court of Appeal (132 J.P. 77) reversed. (*Avais v. Hartford Shankhouse and District Workingmen's Social Club and Institute, Ltd.* H.L.) 133

C**CHILDREN AND YOUNG PERSONS**

1. Child; custody; order by justices; appeal; stay of execution.—In matrimonial proceedings for the custody of a child under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, justices, on being informed that an appeal from their decision is intended, should grant a stay of execution unless there are special reasons of urgency justifying a refusal. (*B v. B P.D.A.*) 245
2. Child; custody; order by justices; disobedience by parent; committal; appeal to High Court; hearing by Divisional Court of Probate, Divorce and Admiralty Division; power of justices to suspend committal order; permissible period of imprisonment.—By s. 13 (1) of the Administration of Justice Act, 1960: "... an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court ..." Under s. 13 (2) (a) an appeal from justices lies to a Divisional Court of the High Court. The High Court, therefore, has jurisdiction to hear an appeal from an order of justices committing the parent of a child to prison under s. 54 (3) of the Magistrates' Courts Act, 1952, for disobedience to an order made in matrimonial proceedings relating to the custody of a child, and under R.S.C., Ord. 109, r. 2 (2), this appeal is heard by a Divisional Court to the Probate, Divorce and Admiralty Division. Justices have no power under s. 39 of the Criminal Justice Act, 1967, to suspend such a sentence of imprisonment. Nor have they power to commit a person to prison for a fixed period; the proper order is to commit the person to prison until he obeys the order which he has disobeyed. (*B v. B P.D.A.*) 245

COMMONWEALTH IMMIGRANTS

1. Notice refusing admission; examination by immigration officer; whether within prescribed time limit; proof of time of arrival; where onus lies; Commonwealth Immigrants Act, 1962, sch. 1 para. 1 (2), para. 2 (3).—By para. 1 (2) of sch. 1 to the Commonwealth Immigrants Act, 1962, an immigration officer is not empowered to require any person who lands or seeks to land in the United Kingdom to submit to an examination for the purpose of determining whether he is a Commonwealth citizen subject to control under part I of the Act more than 24 hours after he has landed. By para. 2 (3) of sch. 1 a notice refusing admission shall not be given to any person later than 12 hours after the conclusion of the examination. On the morning of February 10, 1968, the applicants, who were British subjects under the British Nationality Act, 1948, and also Commonwealth citizens under the Commonwealth Immigrants Act, 1962, were found walking along a road near Banstead, Surrey. They were taken to Banstead police station and there examined by immigration officers. Within 12 hours of the examination each was served with a notice refusing him admission to this country and they were taken to Brixton Prison. In each case an immigration officer swore an

COMMONWEALTH IMMIGRANTS—*continued*

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affidavit that he was not satisfied that the applicant had arrived in this country more than 24 hours before he was examined. The applicants maintained that they had landed early in the morning of February 7 and that on landing they had been taken to a house where they had lived for three days:—*Held*: (ASHWORTH, J., dissenting): once the validity of the examination was challenged by the applicants on the ground that a condition precedent to it had not been fulfilled, the onus rested on the prosecution to prove that the examination had taken place within 24 hours of the landing of the applicants in the United Kingdom. (*R. v. Brixton Prison Governor. Ex parte Ahson and Others. Q.B.D.*)

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2. Request for admission for specified person; immigration officer not satisfied applicant entitled to admission for that period; discretion of immigration officer; no obligation to consider whether applicant entitled to admission for shorter period; Commonwealth Immigrants Act, 1962, s. 2 (1), as substituted by Commonwealth Immigrants Act, 1968, s. 2 (1).—Where an immigration officer, acting under the Commonwealth Immigrants Act, 1962, s. 2 (1) (as substituted by the Commonwealth Immigrants Act, 1968), has come to the conclusion that a Commonwealth applicant for admission to the United Kingdom for a specified period is not entitled to be admitted for that period, there is no obligation on the officer, on his own initiative, to consider whether the applicant is entitled to admission for a shorter period. (*R. v. Secretary of State for Home Affairs. Ex parte Harnaik Singh. Q.B.D.*)

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COMPULSORY PURCHASE

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1. Assessment; date as at which compensation is to be made; sale in open market; equivalent reinstatement; Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. 2, r. 5.—Compensation for the compulsory purchase of land under rr. 2 and 5 of the Acquisition of Land (Assessment of Compensation) Act, 1919, is to be assessed, under r. 2, as at the date when the value is being agreed, or is being assessed by the appropriate tribunal, or, if it is earlier, the date when possession was taken (*per* LORD DONOVAN, when the promoter becomes the owner of the property, whether in law or equity, in place of the expropriated owner and enters into possession of it); and, under r. 5, the appropriate date is the earliest date at which the owner of the property taken could reasonably have begun replacement; but under neither rule is compensation to be assessed by reference to values or the cost of equivalent reinstatement at the date of the notice to treat. (*Birmingham City Corporation v. West Midland Baptist (Trust) Association (Incorporated) H.L.*) 524
2. Compensation; assessment; appropriate alternative development; certificate; opinion as to expected planning permission; relevant dates; Land Compensation Act, 1961, s. 17 (4).—Where, for purposes of assessing compensation, application is made for a certificate of appropriate alternative development, a local planning authority must, under s. 17 (4) of the Land Compensation Act, 1961, form an opinion as to what planning permission might have reasonably been expected to be granted as at the date of (a) the actual notice to treat, (b) the deemed notice to treat, or (c) the offer to purchase, as the case may be. (*Jelson, Ltd. v. Minister of Housing and Local Government and Others; George Wimpey & Co., Ltd. v. Minister of Housing and Local Government. C.A. (Civ. Div.)*) 564
3. Compensation; purchase notice; assumptions on valuation that planning permission reasonably to be expected and no part of land to be compulsorily acquired; Land Compensation Act, 1961, s. 16 (2), (7).—Subsection 16 (7) of the Land Compensation Act, 1961, a provision wholly favourable to the land owner, prevents any diminution of the value of his land being secured by a contention that planning permission would have been refused on the ground that the land was likely to be compulsorily acquired. (*Devotwill Investments, Ltd. v. Margate Corporation. C.A. (Civ. Div.)*) 300
4. Notice to treat; service; service "deemed to be effected"; service on owner by post; returned "gone away"; Interpretation Act, 1889, s. 26.—Following on the making of a compulsory purchase order in respect of a house and yard, the local compensating authority, in May, 1965, sent to the owner of the property at an address at which she had resided a notice to treat by the recorded delivery postal service. The notice came back marked "returned undelivered" with a note that the addressee had "gone away". In December, 1965, the authority sent the notice to treat to the owner's agents:—*Held*: although the letter of May, 1965, containing the notice had been properly addressed, prepaid and posted within s. 26 of the Interpretation Act, 1889, in view of the fact that from the evidence it appeared that the notice had never reached the owner of the property the court could not deem it to have been then served; the notice, therefore, was not validly served until December, 1965. (*Hewitt v. Leicester City Council. C.A. (Civ. Div.)*) 452

CRIMINAL LAW

1. Abandonment of appeal; application to withdraw notice of abandonment; when court will entertain application; Criminal Appeal Rules

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CRIMINAL LAW—continued

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- 1968, r. 10.—The Court of Appeal (Criminal Division) will not entertain an application to withdraw notice of abandonment of an appeal unless it is apparent on the face of the application that some ground exists for supposing that there may have been either fraud, or at any rate bad advice given by a legal adviser, which has resulted in an unintended and ill-considered decision to abandon the appeal. (*R. v. Sutton* C.A. (Cr. Div.)) 298
2. Alternative verdict; offence alleged expressly or by implication in indictment; indictment for larceny; no count for receiving; power to convict of receiving; Criminal Law Act, 1967, s. 6 (3).—By s. 6 (3) of the Criminal Law Act 1967, where a jury find a person not guilty of the offence specifically charged in the indictment, but the allegation in the indictment includes, expressly or by implication, an allegation of another offence, the jury may find him guilty of that other offence. Where an indictment charges larceny and contains no count for receiving, a jury is not entitled to convict of receiving either at common law or by virtue of the above mentioned subsection, since the allegation of larceny does not expressly or by implication include the offence of receiving:—*Per Curiam*: It is of the first importance that a man charged with an offence should know with certainty of what he may be convicted. No court should be encouraged to cast around to see whether the words of the indictment can be found to contain, by some arguable implication, the seeds of some other offence. (*R. v. Woods* C.A. (Cr. Div.)) 51
3. Appeal; fresh evidence; admission of fresh evidence of scientific or medical opinion; pathologist; inability to obtain evidence of eminent pathologist at trial; Criminal Appeal Act, 1968, s. 23.—Only in most exceptional cases will the court receive under s. 23 of the Criminal Appeal Act, 1968, fresh evidence of scientific or medical opinion, as it can very rarely be successfully contended that there is a reasonable explanation for such evidence not having been adduced at the trial. Where, however, on a charge of murder the case for the Crown at the trial rested substantially on the opinion of a pathologist on one particular point, and the defendant's advisers had taken steps to obtain the evidence of an eminent medical expert who, through unforeseen circumstances, was unable to attend, and the pathologist whom they did call was unable to challenge the evidence of the prosecution:—*Held*: as it subsequently appeared that the evidence of the medical expert called for the Crown could be challenged by that of an expert of equal standing, the court would, in the interests of justice, admit fresh evidence from the last-mentioned expert. (*R. v. Lomas* C.A. (Cr. Div.)) 285
4. Appeal; fresh evidence; events during trial; conduct of trial Judge; signs of impatience and interruptions.—The power of the Court of Appeal to receive fresh evidence under s. 23 (1) (c) of the Criminal Appeal Act 1968, on an appeal against conviction is not limited to the evidence of witnesses who speak to the offence or the offender, but it extends to evidence of what happened during the trial, as, *e.g.*, the conduct of the presiding Judge. Where an allegation has been made that a trial has been rendered unfair by the conduct of the presiding Judge, the Court of Appeal will draw a distinction on conduct which may be regarded as discourteous and showing signs of impatience—such as interruptions, grimaces and exclamations, which were alleged to have occurred in the present case—but which did not invite the jury to disbelieve the witnesses for the defence, and conduct which actively and positively has obstructed defending counsel in conducting his defence. (*R. v. Hircock* *R. v. Farmer* *R. v. Leggett* C.A. (Cr. Div.)) 98

CRIMINAL LAW—*continued*

5. Appeal; fresh evidence; "evidence likely to be credible"; evidence well capable of belief; Criminal Appeal Act, 1966, s. 5.—The phrase "evidence . . . likely to be credible" in s. 5 of the Criminal Appeal Act, 1966 (replaced by s. 23 of the Criminal Appeal Act, 1968), which deals with the admission of fresh evidence on appeal, means evidence well worthy of belief. A more liberal attitude with regard to the reception of fresh evidence than had hitherto prevailed was introduced by s. 5 of the Act of 1966. (*R. v. Stafford. R. v. Luvaglio. C.A. (Cr. Div.)*)

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6. Appeal against sentence; committal for sentence to quarter sessions; order for return to borstal; no right of appeal to Court of Appeal; Criminal Justice Act, 1961, s. 12 (1) (a); Criminal Appeal Act, 1968, s. 10 (3) (b).—By s. 12 (1) of the Criminal Justice Act, 1961: "Where a person sentenced to borstal training—(a) being under supervision after his release from a borstal institution . . . is convicted, whether on indictment or summarily, of an offence for which the court has power, or would have power but for the statutory restrictions upon the imprisonment of young offenders, to pass a sentence of imprisonment, the court may, instead of dealing with him in any other manner, order that he be returned to a borstal institution." By s. 10 (3) of the Criminal Appeal Act, 1968: "An offender dealt with for an offence at Assizes or quarter sessions in a proceeding to which subs. (2) of this section applies may appeal to the Court of Appeal against sentence in any of the following cases . . . (b) where the sentence is one which the court convicting him

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CRIMINAL LAW—continued	PAGE
had not power to pass . . .” Where an offender is convicted of an indictable offence at a magistrates’ court and committed to quarter sessions for sentence, and quarter sessions make an order, under s. 12 of the Criminal Justice Act, 1961, that the offender be returned to a borstal institution, as distinct from passing a new sentence of borstal training, there is no right of appeal against sentence to the Court of Appeal, since the sentence is one which quarter sessions could have passed, and, accordingly, s. 10 (3) (b) of the Criminal Appeal Act, 1968, does not apply. (<i>R. v. Bebbington</i> . C.A. (Cr. Div.))	689
7. Compensation; order at quarter sessions; no application by person aggrieved; validity of order; Forfeiture Act, 1870, s. 4, as amended.—An order for compensation under s. 4 of the Forefeiture Act, 1870, as amended, following on conviction at Assizes or quarter sessions may be made only on the application of a person aggrieved. (<i>R. v. Taylor</i> . C.A. (Cr. Div.))	435
8. Compensation; order made by magistrates’ court; no application by party aggrieved; validity of order; Forfeiture Act, 1870, s. 4 (amended as stated below).—The applicants pleaded guilty at a magistrates’ court to charges of larceny. No witnesses were called, and in particular the owners of the stolen property did not give evidence. The applicants were given suspended sentences of imprisonment and each was ordered to pay compensation to the owners of the stolen property under s. 4 of the Forfeiture Act, 1870, as amended by s. 34 of the Magistrates’ Courts Act, 1952, and s. 10 (1) of and para. 9 of sch. 2 to the Criminal Law Act, 1967. On applications for orders of <i>certiorari</i> to quash the orders for compensation:— <i>Held</i> : as no “person aggrieved” within s. 4 of the Act of 1870 had applied for compensation, the justices had no jurisdiction to make the orders for compensation and <i>certiorari</i> would issue to quash them. (<i>R. v. Forest Justices. Ex parte Coppin and Another</i> . Q.B.D.)	433
9. Conviction; two persons jointly charged; larceny of two articles; conviction of one defendant of independent larceny of one article; validity.—When two persons are jointly charged on indictment with an offence, <i>e.g.</i> , larceny of two articles, one of those persons cannot be convicted of the theft of one of the articles independently of his co-accused, <i>i.e.</i> , the theft of that article otherwise than as part of a joint enterprise. (<i>R. v. Parker</i> . C.A. (Cr. Div.))	343
10. Defence; self-defence; direction to jury.—Where an issue of self-defence has been raised, the jury should be directed that the defendant is entitled to be acquitted unless the prosecution has satisfied them beyond reasonable doubt, or so that they are sure, that self-defence cannot be supported, and the precise nature of self-defence should be explained to the jury. (<i>R. v. Moon</i> . C.A. (Cr. Div.))	703
11. Evidence; admissibility; statement drafted by counsel for defendant; request that officer in charge of case should witness statement; submission that statement should be offered to the jury as part of case for the prosecution; undesirable method of conduct of trial.—The defendant requested that a statement drafted for him by his counsel should be submitted to and signed by the officer in charge of the case, and contended that counsel for the prosecution should be compelled to refer to it in his opening speech:— <i>Held</i> : this was an attempt to introduce an entirely inappropriate and undesirable method of conduct of criminal trials, and the Judge had rightly refused to accede to the application. (<i>R. v. Thatcher</i> . C.A. (Cr. Div.))	281
12. Evidence; alibi; notice of particulars; extent of statutory requirement; application only when alibi relates to time of alleged crime; place or	

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date of offence; reference to committal charge and depositions; wrongful exclusion of alibi evidence; application to proviso to s. 2 (1) of Criminal Appeal Act, 1968; Criminal Justice Act, 1967, s. 11.—The statutory requirement in s. 11 of the Criminal Justice Act, 1967, that particulars of an alibi defence must be given within seven days of the end of the proceedings before the examining justices, and that, unless these are given, evidence relating to alibi cannot be given by the defendant without leave of the court, applies only where the evidence relates to the whereabouts of the defendant at the time when the crime is alleged to have been committed. Accordingly, evidence relating to his whereabouts on some other occasion is not subject to the restrictions of the section. Where a question arises with regard to the place or date at or on which the offence is alleged to have been committed for the purpose of s. 11 of the Act of 1967, the question must be resolved by reference to the committal charge and depositions. *Per Curiam*: Where alibi evidence has been wrongly excluded, the Court of Appeal will rarely apply the proviso to s. 2 (1) of the Criminal Appeal Act, 1968. (*R. v. Lewis*, C.A. (Cr. Div.))

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13. Evidence; handwriting; need of expert evidence; warning to jury.—A Judge should never invite or exhort a jury to look at disputed handwritings for the purpose of making comparisons without the aid of an expert, and he should warn them of the dangers of doing so, but where the disputed documents have already been put before the jury as part of the probative material in the case, all that can be done as a matter of

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- practical reality is to ask them not to make comparisons and clearly to bear in mind that they are not qualified to do so. (*R. v. O'Sullivan. C.A. (Cr. Div.)*) 338
14. Firearm; possession; suspended sentence; possession before expiration of five years from imposition of sentence; Firearms Act, 1968, s. 21 (2).—By s. 21 (2) of the Firearms Act, 1968: "A person who has been sentenced to borstal training, to corrective training for less than three years or to imprisonment for a term of three months or more but less than three years, or who has been sentenced to be detained for such a term in a detention centre or in a young offenders institution in Scotland, shall not at any time before the expiration of the period of five years from the date of his release have a firearm or ammunition in his possession." This subsection does not apply to a case where the accused person has been sentenced to a suspended sentence of imprisonment and is found to have a firearm or ammunition in his possession before the expiration of five years from the imposition of that sentence. (*R. v. Fordham. Kent Assz.*) 626
15. Forgery; possession of forged banknotes; defence; "lawful authority or excuse"; intention to hand over banknotes to police; banknotes not handed over at first available opportunity; Forgery Act, 1913, s. 8 (1).—On a charge of possession of forged banknotes contrary to s. 8 (1) of the Forgery Act, 1913, possession solely with the intention of handing the notes over to the police is a "lawful authority or excuse" within the meaning of the subsection, and, accordingly, a valid defence. A defendant is not necessarily deprived of this defence by his failure to hand the notes over to the police at the first available opportunity. (*R. v. Wuyts. C.A. (Cr. Div.)*) 492
16. Handling stolen goods; dishonestly assisting in retention; failure to reveal to police presence of goods on defendant's premises; Theft Act, 1968, s. 22 (1).—A mere failure on the part of the defendant to reveal to a police officer who has visited and searched his premises the presence of stolen goods therein does not amount to assisting in the retention of stolen goods within the meaning of s. 22 (1) of the Theft Act, 1968, nor is the position affected by the fact that the defendant, when told that he would be arrested, said to the arresting officer: "Get lost". (*R. v. Brown. C.A. (Cr. Div.)*) 592
17. Indecent assault on female; girl under 16; consent; no evidence of hostility.—Any indecent touching of a girl under 16 is an indecent assault even though the girl may have willingly consented to it and though there has been no compulsion or hostility on the part of the defendant. (*R. v. McCormack. C.A. (Cr. Div.)*) 630
18. Indictment; additional charges; charges based on fresh facts not subject of committal; duty of police to inform defendant when charges formulated; duty of defence to obtain copy of indictment from court; Indictments Act, 1915, sch. I, r. 13.—Where additional charges are preferred against a defendant based on fresh facts which were not the subject of committal, it is the duty of the police to inform the defendant of those charges as soon as it is decided to formulate them, and to caution him so that he can, if he wishes, make a statement. Furthermore those representing the defence should obtain at the earliest possible moment a copy of the indictment from the clerk of Assize or clerk of the peace, who under r. 13 of sch. I to the Indictments Act, 1915, is under a duty to supply the defendant with a copy free of charge. (*R. v. Dickson. C.A. (Cr. Div.)*) 257
19. Indictment; committal for trial for non-existent offence; further counts, one for non-existent and one for existing offence, added; counts for

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- non-existent offences quashed; trial on added count relating to existing offence; validity of conviction; Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2), proviso (i).—The appellant was committed for trial on a charge of unlawfully and maliciously shooting at X on January 21, 1968, with intent to resist lawful arrest, contrary to s. 18 of the Offences against the Person Act, 1861. The indictment when drawn included also: (a) a further count under s. 18, describing the offence in the same terms, except that the intent was described as "to do X grievous bodily harm or to maim, disfigure or disable him"; and (b) a count for using a firearm with intent to resist lawful apprehension, contrary to s. 23 of the Firearms Act, 1937. The trial Judge quashed the count which reproduced the committal charge and also the added count (a), in view of the fact that as from January 1, 1968, these offences had been rendered non-existent by reason of amendments made to the Act of 1861 by s. 10 (2) of and sch. 3 to the Criminal Law Act, 1967, but directed that the trial on the added count (b) should proceed, and the appellant was convicted on that count:—*Held*: the committal was a nullity as being for a non-existent offence; no charge could validly be attached to such a nullity under s. 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, proviso (i), so as to be itself a charge properly included in the indictment; and, therefore, the conviction must be quashed. (*R. v. Lamb* (Thomas). C.A. (Cr. Div.)) 89
20. Indictment; duplicity; inducement to enter into agreement to invest money; count charging two statements and two promises as inducement; allegations of method by which inducement accomplished; Prevention of Fraud (Investments) Act, 1958, s. 13 (1) (a).—The appellant was charged on a count of an indictment which alleged that, contrary to s. 13 (1) (a) of the Prevention of Fraud (Investments) Act, 1958, he fraudulently induced G to enter into an agreement to invest money in his (appellant's) company "by promising orally [that the money would be used to acquire a share in the company], by stating [that the company had a successful and profitable business], by promising [that the investment would lead to G being given a secure position with the company], and by stating [that the appellant was in a position to give and had given G honest advice], all of which statements and promises [the appellant] knew to be misleading, false and deceptive at the time of making the same":—*Held*: the count was not bad for duplicity or uncertainty because the offence was that of fraudulently inducing another person to enter into an agreement to invest money, and the allegations of the statements and promises were merely allegations of the means by which the inducement was accomplished. (*R. v. Linnell*. C.A. (Cr. Div.)) 707
21. Indictment; joinder of counts; series of offences; "series"; two offences; offences exhibiting similar features; joint trial; *prima facie* case established that offences may be properly and conveniently tried together; two murders; when joint trial desirable; Indictments Act, 1915, sch. 1, r. 3.—By r. 3 of sch. 1 to the Indictments Act, 1915, "Charges for any . . . misdemeanours may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character." Two offences may constitute a "series" within the meaning of this rule, and the requirements of the rule are satisfied if the offences exhibit such similar features as to establish a *prima facie* case that they can properly and conveniently be tried together. Two charges of murder may in appropriate circumstances be joined in one indictment and tried together. The Judge, in exercising his discretion whether or not to order separate trials, must recognize the inevitable prejudice which is created where a defendant has to face two charges of murder

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| instead of one, but such a consideration is not conclusive where the two cases exhibit unusual common features which render a joint trial desirable in the general interests of justice, regard being had to the interests, not only of the defendant, but also to those of co-defendants, the Crown, witnesses and the public. (R. v. Kray and Others. C.A. (Cr. Div.)) | 719 |
| 22. Indictment; same incident made subject-matter of several charges; conviction by jury of both graver and lesser offences.—The same incident should not be made the subject-matter of distinct charges, in the sense that it should not be left open to a jury to convict of both a graver and a lesser offence arising out of the one incident. (R. v. Harris. C.A. (Cr. Div.)) | 442 |
| 23. Jurisdiction; aiding and abetting; principal offence committed in England; persons accused of aiding and abetting situated in Scotland.—An articulated lorry was driven on a highway in England by H, on the instructions of his employers M and R M Ltd., it being then in a defective mechanical condition with the result that it became out of control, collided with another vehicle, and caused the deaths of six persons. R M Ltd., was a Scottish company and its place of business was in Scotland, and M was in Scotland at all material times. R M Ltd., and M being charged with aiding, abetting, counselling, and procuring H to cause the deaths by dangerous driving contrary to s. 1 of the Road Traffic Act, 1960, moved to quash the indictment for want of jurisdiction:— <i>Held</i> : if the offence charged was committed it was committed when the principal offence was complete, <i>i.e.</i> , when the deaths were caused by the dangerous driving of H and at the place where that dangerous driving took place, namely, in England, and, therefore, an English court had jurisdiction to try the indictment. (R. v. Hart, Millar and Others. Crown Court, Liverpool) | 554 |
| 24. Manslaughter; causing death by unlawful act; intent to constitute unlawful act; act under influence of drugs; no distinction from acts during drunkenness.—To support a conviction of manslaughter arising from an unlawful act by the defendant, even if intent has to be proved to constitute the unlawful act, no further specific intent has to be proved to render the offence manslaughter. For the purpose of criminal responsibility there is no distinction between the effect of drugs taken voluntarily and drunkenness voluntarily induced. Accordingly, self-induced over-powering by drugs cannot be a defence to a charge of manslaughter. The appellant killed a young woman while under the influence of a drug which he had voluntarily taken. His defence was that he had no knowledge of what he was doing and no intention to harm her. The jury were directed that it was sufficient for the Crown to prove that "he must have realised, before he got himself into the condition he did by taking the drug, that acts such as those he subsequently performed and which resulted in the death were dangerous":— <i>Held</i> : the direction was correct in law. <i>Per Curiam</i> : Manslaughter remains a most difficult offence to define because it arises in so many different ways and, as the mental element (if any) required to establish it varies so widely, any general references to <i>mens rea</i> is apt to mislead. (R. v. Lipman. C.A. (Cr. Div.)) | 712 |
| 25. <i>Mens rea</i> ; presumption; displacement; construction of statute.— <i>Mens rea</i> is an essential ingredient of every criminal offence unless some reason can be found for holding that it is not necessary. Where an offence is created by statute the words of the section creating the offence must be looked at to see whether, either expressly or by necessary implication, they displace the general rule or presumption that <i>mens</i> | |

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rea is a necessary prerequisite before guilt of the offence can be found. Though sometimes help in construction is derived from noting the presence or absence of the word "knowingly", no conclusive test can be laid down as a guide in finding the fair, reasonable, and common-sense meaning of the language of the statute. The mere absence of "knowingly" is not enough to displace the presumption. The fact that other sections of the Act expressly require *mens rea*, e.g., because they contain the word "knowingly", is not in itself sufficient to justify a decision that a section which is silent as to *mens rea* creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence it is necessary to go outside the Act and examine all the relevant circumstances in order to establish that this must have been the intention of Parliament. (*Sweet v. Parsley*. H.L.)

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26. Obscene publication; direction to jury; tendency to deprave and corrupt; significant portion of persons likely to read; defence of public good; onus on defence; ruling by Judge that defence witnesses should be called first; Obscene Publications Act, 1959, s. 1 (1), s. 4 (1).—On the construction of s. 1 (1) of the Obscene Publications Act, 1959, as applying to a book, a jury should be directed to consider whether the effect of the book is to tend to deprave and corrupt a significant proportion of persons likely to read it. What amounts to a significant proportion is a matter entirely for the jury to decide. Where a defence is raised under s. 4 of the Act that the publication was justified as being for the public good, the onus is on the defendant to establish that defence on a balance of probabilities. The jury should be directed that they have to consider the question of public good only if they are convinced that the publication was obscene. In considering that question, they should consider, on the one hand, the number of readers whom they believe would tend to be depraved and corrupted by the publication, the strength of the tendency to deprave and corrupt, and the nature of the depravity and corruption; on the other hand, they should consider the strength of the literary, sociological or ethical merit which they consider the article to possess. They should then weigh up all these factors and decide whether on balance the publication has been proved to be justified as being for the public good. On a trial involving the issue of public good, a Judge may properly exercise his discretion in directing that the defence witnesses on this issue be called first, since the Crown cannot know in advance on which of the grounds in s. 4 the defence intend to rely. (*R. v. Calder & Boyars, Ltd.* C.A. (Cr. Div.))

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27. Police; use of informer; disclosure to court of existence of informer; informer not to incite others to commit offence; participation by informer in offence already planned.—Where the police make use of the services of an informer, there is no duty on them to disclose the fact that an informer has been employed, but they must never conceal facts which go to the quality of the offence. An informer must never be allowed to incite others to commit an offence which otherwise they would not have committed, and the police must never take part in carrying out such an offence. But the police are entitled to avail themselves of information regarding an offence already laid on. In such a case the police are entitled, and it is their duty, to mitigate the consequences of the offence, e.g., to protect the proposed victim, and it may be perfectly proper for them to encourage the informer to take part in the offence, or, indeed, for a police officer to do so. (*R. v. Birtles*. C.A. (Cr. Div.))
28. Presumption of guilt; direction to jury.—At the trial of the appellant for unlawful sexual intercourse with a girl aged 15 the Judge, following a

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- passage in *Archbold's Criminal Practice* (36th ed.), p. 1001, based on *R. v. Stoddart* (1909) 73 J.P. 348, directed the jury that where the prosecution called evidence from which the defendant's guilt might be presumed, and, therefore, called for an explanation from the defendant, or where the defendant gave an answer or explanation which the jury rejected as being untrue, a presumption was raised on which the jury might be justified in returning a verdict of guilty:—*Held*: as the jury had not been told, either before or after this explanation, that they had to be sure, or had to be satisfied beyond all reasonable doubt, before they could convict, the explanation was too complicated and might have mislead the jury, and the conviction of the appellant must be quashed. (*R. v. Bradbury*. C.A. (Cr. Div.)) 443
29. Protection of depositors; invitation to deposit money; mutual benefit society; advertisements for deposits; variety of benefits offered; loan repayable at a premium; meaning of "premium"; advertisement sent to member of society; issue to public; Protection of Depositors Act, 1963, s. 2 (1), s. 26 (1).—The appellant was convicted on two counts charging him with inviting the public to deposit money with him, contrary to s. 2 (1) of the Protection of Depositors Act, 1963. Section 26 (1) of the Act defined "deposit" as "a loan of money repayable at a premium". In 1964 the appellant became general secretary of a mutual benefit society. He was a member of the society, but in fact ran it and was its alter ego. In 1966 L applied to join the society. His application was accepted by the appellant, who enclosed with the letter of admission a printed circular signed by him. This was addressed to the public at large and referred to the benefits of membership of the society and of paying in money into it. In addition to their right to withdraw their money at any time, prospective depositors were promised a substantial dividend, £500 accidental death life cover, the chance of doubling the deposit, and borrowing facilities. L made an initial deposit of £3 on becoming a member and afterwards deposited substantial sums. A further circular signed by the appellant invited deposits and offered benefits in the form of personal loans, purchase of a house or flat without a deposit, and £500 accidental life cover:—*Held*: (i) that the word "premium" in s. 26 (1) was not confined to the payment of an ascertained capital sum on the repayment of a loan made to the society, and the advantages to the depositors held out in the circulars were "premiums" within the meaning of that subsection; (ii) as on becoming a member of the society, L did not cease to be a member of the public, the circular sent to him on his admission to the society was issued to the public within the meaning of s. 2 (1) of the Act; the conviction of the appellant on both counts was, therefore, correct. (*R. v. Delmayne*. C.A. (Cr. Div.)) 458
30. Quarter sessions; committal for sentence; committal a nullity; right of appeal to Court of Appeal; Magistrates' Courts Act, 1952, s. 18 (1), s. 29.—By s. 29 of the Magistrates' Courts Act, 1952: "Where on the summary trial under s. 18 (3) or s. 19 of this Act of an indictable offence triable by quarter sessions a person who is not less than 17 years old is convicted of the offence, then, if on obtaining information about his character and antecedents the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, instead of dealing with him in any other manner, commit him in custody to quarter sessions for sentence in accordance with the provisions of s. 29 of the Criminal Justice Act, 1948." The appellant was charged at a magistrates' court with driving while disqualified, contrary to s. 110 of the Road Traffic Act, 1960, as amended. The prosecution applied for summary trial under s. 18 (1) of the

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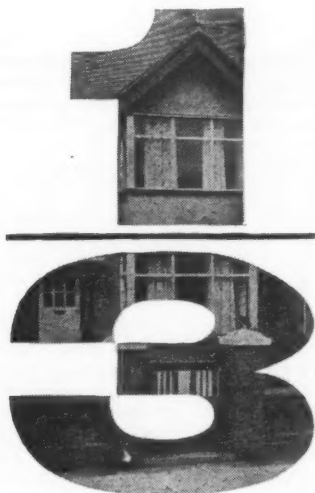
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- Magistrates' Courts Act, 1952, and the justices acceded to the application. The appellant pleaded guilty and the justices committed him to quarter sessions for sentence under s. 29 of the Act of 1952. The committal was a nullity, because s. 29 contained no provision for committal under s. 18 (1). The appellant was sentenced at quarter sessions to imprisonment and disqualification and appealed against sentence:—*Held*: the Court of Appeal had no jurisdiction to hear the appeal, as the committal was a nullity, and the proper procedure was to challenge the committal by an application for an order of *certiorari*. (R. v. Jones. C.A. (Cr. Div.)) . . . 144
31. Rape; defence; consent; evidence of previous intercourse with complainant; allegation of prostitution.—On a trial for rape where the defence of consent is set up evidence of previous sexual intercourse between the complainant and the accused is admissible, the fact of such intercourse being relevant to the question of consent, but evidence of sexual intercourse between the complainant and other men is not admissible, including acts of familiarity leading to an act of intercourse. Where the defence alleged that the complainant is a prostitute evidence that she is of notoriously bad character for chastity is admissible, and also evidence of acts of prostitution which form the ground on which the allegation of prostitution is based. (R. v. Bashir and Another. Leeds Assz.) 687
32. Reference by Home Secretary; power to refer part of use; reference for review of sentence; refusal of court to hear argument in regard to conviction; Criminal Appeal Act, 1968, s. 17 (1) (a).—Under s. 17 (1) (a) of the Criminal Appeal Act, 1968, the Home Secretary has power to refer part of a case only to the Court of Appeal for review, *e.g.*, that part which deals with the sentence imposed. In such a case the court may refuse to hear any argument with regard to conviction. (R. v. Bardoe. C.A. (Cr. Div.)) 336
33. Robbery with violence and murder; summing-up; direction that offences stood or fell together; no direct evidence of number of men involved in attack or of their individual roles; common design to rob; question whether common design involved use of such force as would include killing or infliction of grievous bodily harm not left to jury; convictions of murder quashed; no power to substitute verdict of guilty of manslaughter.—The appellants were convicted of both offences on an indictment which charged both of them with robbery with violence and with murder. The case for the prosecution was that the appellants were among a number of men who had robbed a jeweller and in the course of the attack had inflicted injuries on him as the result of which he died. There was no direct evidence of the number of men involved in the attack or of their individual roles and there was no direct evidence to connect either of the appellants with the attack, though there was circumstantial evidence. The appellants' defence was a denial of all knowledge of the attack. The jury, after having been correctly directed on the ingredients of both offences and on participation in a common design, were further directed that the offences stood or fell together:—*Held*: that this was a misdirection necessitating the quashing of the convictions for murder, since, it being impossible to identify the part of either appellant in the attack, neither could be convicted of an offence which went beyond the common design to which he was a party; and though there was clearly a common design to rob, the question had not been left to the jury whether that common design further involved the use of such force, including killing or the infliction of grievous bodily harm, as was necessary to effect the robbery or secure escape without fear of subsequent identification; the Court could not substitute



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a verdict of manslaughter because, if a common design to inflict grievous bodily harm had not been established, the jury could have taken the view that the killing was the unauthorized act of one adventurer for which his co-adventurers were not responsible. (<i>R. v. Lovesey. R. v. Peterson. C.A. (Cr. Div.)</i>)	49
34. Self-defence; duty to retreat; doctrine not applicable to cases of homicide only.—Before a defence of self-defence can be relied on, the defendant must prove that when he was threatened he was prepared to temporise and disengage and perhaps make some physical withdrawal, at any rate to the extent of demonstrating by his actions that he does not wish to fight. This doctrine applies to assault and all other charges as well as to homicide. (<i>R. v. Julien. C.A. (Cr. Div.)</i>)	489
35. Sentence; borstal training; leave to appeal granted; reports to be before Court of Appeal.—Where leave to appeal against a sentence of borstal training has been granted, it is important that there should be before the Court of Appeal for their assistance not only the most up-to-date probation report, but also reports from the head master and housemaster of the borstal institution where the appellant has been detained in the interim. (<i>R. v. Weekes. C.A. (Cr. Div.)</i>)	309
36. Sentence; borstal training; young offender placed on probation by quarter sessions; offence during period of probation; sentence of three months' detention in detention centre; six weeks' detention served; offender brought back to quarter sessions; sentence of borstal training for original offences.—On January 8, 1968, the appellant, a youth of 19, was placed on probation at quarter sessions in respect of offences of larceny and traffic offences, a number of outstanding offences being taken into consideration. On April 10, 1968, he was convicted in Scotland of attempted theft and sentenced to three months' detention. After he had served six weeks' detention, he was brought back to quarter sessions for sentence in respect of the offences in respect of which he had been placed on probation and was sentenced to borstal training. Two probation officers and the governor recommended borstal training: — <i>Held</i> : the sentence of borstal training was, in the circumstances, proper. (<i>R. v. Bingham. C.A. (Cr. Div.)</i>)	42
37. Sentence; consecutive sentences; sentence to detention centre; consecutive sentence of imprisonment; wrong principle; sentences made concurrent.—It is wrong in principle to make a sentence of imprisonment consecutive to a sentence of detention in a detention centre. Where a sentence of imprisonment is passed on an offender who is serving a period of detention in a detention centre which has not yet expired, the sentence should be made concurrent so that the offender will go straight to prison. (<i>R. v. Rasis. C.A. (Cr. Div.)</i>)	731
38. Sentence; consecutive sentences totalling 21 years' imprisonment; offences under Official Secrets Acts; separate and distinct offences; Official Secrets Act, 1911, s. 1 (1) (c); Official Secrets Act, 1920, s. 8 (1). —The applicant, who had been employed in a branch of the Royal Air Force of the highest confidentiality and secrecy, pleaded guilty to five counts under s. 1 (1) (c) of the Official Secrets Act, 1911, as amended. Count 1 charged him with having in January, 1967, for a purpose prejudicial to the safety or interests of the State, communicated to other persons information calculated to be, or which might be, or was intended to be, useful to an enemy. The second, third and fifth counts charged him with similar offences in December, 1967, January, 1968, and March, 1968, respectively. The fourth count charged him with recording such information. The offences charged constituted four separate offences, counts 4 and 5 being treated as constituting a single offence.	

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The applicant was sentenced on counts 3 and 5 to fourteen and seven years imprisonment to run consecutively, and on counts 1, 2 and 4 to five, three and five years' imprisonment concurrent. The total sentence, therefore, was one of 21 years' imprisonment. On application for leave to appeal:—*Held*: though the power to impose consecutive sentences must be exercised with care, as there were over a period of 14 months four quite separate and distinct offences, connected in pursuance of a set policy or system, it could not be right to say that the applicant should be treated no differently from a person who had committed only one offence; the offences were of extreme seriousness, and, though separate, were cumulative offences; and, therefore, the sentences passed were right and proper. (R. v. Britten. C.A. (Cr. Div.))

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39. Sentence; consecutive sentences; undesirability of part of sentence on second indictment being made to run consecutively to sentence imposed on first indictment.—Where a defendant is convicted on both of two indictments it is undesirable that a portion of the sentence on the second indictment should be directed to be consecutive to the sentence on the first indictment, and a sentence in that form should not be imposed. (R. v. Gregory and Mills. C.A.)

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40. Sentence; curative element; alcoholic; sentence within limits of proper sentence for offence.—In a case of dishonesty where there is a background of alcoholism it may be proper to increase the sentence to enable a case to be undertaken while the defendant is in prison, provided that the sentence falls within the limits of a proper sentence for the offence

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charged, but the sentence must not be increased beyond a sentence within the appropriate range merely in order to provide an opportunity for curative treatment. (<i>R. v. Moylan. C.A. (Cr. Div.)</i>)	709
41. Sentence; detention in hospital; selection of hospital; matter for Home Secretary; Mental Health Act, 1959, s. 65.—The considerations which determine in which hospital a convicted person shall be detained under the Mental Health Act, 1959, are matters for the Secretary of State and it is not for the court to interfere. The primary function of the Criminal Division of the Court of Appeal, when an appellant appeals against a restriction order made pursuant to s. 65 of the Act of 1959, is to consider whether the original order was properly made. (<i>R. v. McNaney. C.A. (Cr. Div.)</i>)	315
42. Sentence; extended term of imprisonment; inclusion of period of suspended sentence; Criminal Justice Act, 1967, s. 37 (2).—The period of a suspended sentence cannot become an extended term of imprisonment under s. 37 of the Criminal Justice Act, 1967. Where, therefore, the appellant had in September, 1968, received a suspended sentence of 18 months' imprisonment, and in February, 1969, was sentenced to three years' imprisonment for further offences, and the court ordered that the suspended sentence should take effect consecutively to that term, and certified that the total of 4½ years was to be an extended term of imprisonment under s. 37 of the Criminal Justice Act, 1967:— <i>Held</i> : the extended term of imprisonment should have been applied to the sentence of three years only, and not to the eighteen months' suspended sentence. (<i>R. v. Barrett. C.A. (Cr. Div.)</i>)	590
43. Sentence; incorrigible rogue; limitation of sentence; sentence on basis of having acquired status; sentence not for offences which led to acquiring of status; Vagrancy Act, 1824, s. 10.—The appellant was found guilty at a magistrates' court of being a rogue and vagabond under s. 4 of the Vagrancy Act, 1824, in respect of an offence of indecent exposure. He was remanded for a report, and a few weeks later at the same court pleaded guilty to a similar offence. After a further remand he was committed to quarter sessions for sentence in both cases as an incorrigible rogue under s. 5 of the Act of 1824. He was then sentenced to two consecutive terms of nine months' imprisonment:— <i>Held</i> : the appellant appeared for sentence as having acquired the status of an incorrigible rogue and not for the offences which led him to acquire that status; the maximum sentence permissible under the Act was one of 12 months' imprisonment, and a sentence of 12 months' imprisonment should be substituted. (<i>R. v. Walters. C.A. (Cr. Div.)</i>)	73
44. Sentence; offence of dishonesty; curative element; alcoholic; sentence not to exceed that appropriate to offence.—In relation to offences of dishonesty sentences of imprisonment, except where there is an element of protection of the public involved, are normally intended to be the correct sentence for the particular crime and not to include a curative element. The appellant, who was a chronic alcoholic and had failed in the past to respond to treatment, was sentenced to 27 months' imprisonment for an offence of dishonesty. In imposing the sentence the Judge had in mind the possibility of the appellant being cured, to some extent at any rate, of his alcoholism while in prison, and in particular, of his going to a prison alcoholic unit for treatment:— <i>Held</i> : the sentence must be reduced to one which was appropriate to the offence, namely, 12 months' imprisonment. (<i>R. v. Ford. C.A. (Cr. Div.)</i>)	701
45. Sentence; probation order; breach; undesirability of fresh probation order.—Where there has been a clear breach of a probation order, a	

CRIMINAL LAW— <i>continued</i>	PAGE
court should pause a long time before making a fresh probation order in respect of the same offender. (<i>R. v. Thompson</i> . C.A. (Cr. Div.)) . .	71
46. Sentence; suspended sentence; consecutive sentences totalling over two years' imprisonment; suspension; Criminal Justice Act, 1967, s. 39 (1), s. 104 (2).—Where consecutive sentences the totality of which exceeds two years' imprisonment are imposed, the sentences are by virtue of s. 104 (2) of the Criminal Justice Act, 1967, treated as a single term and there is no power under s. 39 (1) of the Act to suspend the sentence. (<i>R. v. Coleman</i> . C.A. (Cr. Div.))	550
47. Sentence; suspended sentence; decision to bring into effect; subsequent trivial offence of different character from that of offence for which sentence imposed; Criminal Justice Act, 1967, s. 40 (1).—A court may properly consider as unjust within the meaning of s. 40 (1) of the Criminal Justice Act, 1967, the activation of a suspended sentence where the new offence is comparatively trivial, particularly when it is in a different category of crime from the category of the offence for which the suspended sentence was imposed. (<i>R. v. Moylan</i> . C.A. (Cr. Div.))	709
48. Sentence; suspended sentence; offence committed during period of suspension; sentence for that offence to be considered first; question of bringing into effect suspended sentence then to be considered; suspended sentence normally to take effect consecutively to sentence for fresh offence.—Where a fresh offence has been committed during the suspension of an earlier sentence the court before whom the offender is brought should first consider the fresh offence and determine the	

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CRIMINAL LAW—*continued*

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- appropriate sentence for it and should then consider the question of bringing into operation the suspended sentence. Unless there are exceptional circumstances, the court should order that the suspended sentence should take effect and run consecutively to the sentence imposed for the current offence. (*R. v. Ithell. R. v. Jones. R. v. Tomlinson. C.A. (Cr. Div.)*) 371
49. Sentence; suspended sentence; other alternatives to be first eliminated; not a substitute for probation order.—Before deciding to pass a suspended sentence, a court should consider and eliminate other possible alternatives. Only when the court has decided that the offender merits a prison sentence should the option of a suspended or a custodial sentence be considered. In particular, a suspended sentence should not be passed when the proper course is to make a probation order. (*R. v. O'Keefe. C.A. (Cr. Div.)*) 160
50. Sentence; suspended sentence; subsequent offence of different character; consideration whether suspended sentence should be brought into operation; Criminal Justice Act, 1967, s. 40 (1) (a).—In deciding whether a suspended sentence should be brought into operation pursuant to s. 40 (1) of the Criminal Justice Act, 1967, a court is entitled to look at the facts of the subsequent offence, and, if it thinks it right in the circumstances, to decide that, in view of the character of the subsequent offence, it would be unjust to bring the suspended sentence into operation. (*R. v. Griffiths. C.A. (Cr. Div.)*) 507
51. Sentence; suspended sentence; time for deciding whether to be concurrent with or consecutive to earlier suspended sentence; suspended sentence not to be made consecutive to suspended sentence not being put into force; Criminal Justice Act, 1967, s. 40.—A suspended sentence cannot be made consecutive to an earlier suspended sentence which is not then being put into force. The time for deciding whether a suspended sentence should be concurrent or consecutive is the time when the matter is before the court to be dealt with under s. 40 of the Criminal Justice Act, 1967, by way of implementation. (*R. v. Blakeway. C.A. (Cr. Div.)*) 575
52. Sexual offence; inciting child under 14 to commit act of gross indecency; institution of proceedings; need for consent of Director of Public Prosecutions; Sexual Offences Act, 1967, s. 8.—The consent of the Director of Public Prosecutions is not required to the institution of proceedings against an offender for inciting a child under 14 to commit an act of gross indecency with him, inasmuch as there is no reference to the word "incites" in s. 8 of the Sexual Offences Act, 1967. (*R. v. Assistant Recorder of Kingston-upon-Hull. Ex parte Morgan. Q.B.D.*) 165
53. Trial; fitness to plead; issue raised by prosecution; burden of proof; standard of proof; test of unfitness; incapability of defendant to act in his own best interests.—Where the prosecution raise the issue of the defendant's fitness to plead the burden of proving that he is unfit to plead by reason of a disability under s. 4 of the Criminal Procedure (Insanity) Act, 1964, is on the prosecution, and the standard of proof is that ordinarily applicable on a criminal trial, namely, that of proving the matter beyond reasonable doubt. The fact that a defendant is incapable of acting in his own best interests is not in itself sufficient ground to entitle the jury to return a finding of disability, and in directing a jury on the various tests referred to in *R. v. Pritchard* (1836) 7 C. & P. 303, at p. 304, it is not right to preface the various tests by the addition of the word "proper", e.g., "give proper evidence at his trial". (*R. v. Robertson. C.A. (Cr. Div.)*) 5

CRIMINAL LAW—*continued*

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54. Trial; issue of fitness to be tried; postponement of issue; exercise of discretion by Judge; letters to be answered; nature of defendants disability; chances of use for prosecution being successfully challenged by defence; failure to exercise discretion; conviction quashed; Criminal Procedure (Insanity) Act, 1964, s. 4 (2), (3).—By s. 4 (2) of the Criminal Procedure (Insanity) Act, 1964, a court has power to postpone consideration of the question of the defendant's fitness to be tried until any time up to the opening of the case for the defence if, having regard to the nature of any supposed disability, the court is of the opinion that it is expedient to do so and in the interests of the defendant. By s. 4 (3), subject to s. 4 (2), the question of fitness to be tried is to be determined as soon as it arises.—*Held*: as between s. 4 (2) and s. 4 (3), s. 4 (2) was the controlling section, and under it the Judge had to exercise a judicial discretion whether or not to postpone the determination of the question of fitness till after arraignment; in exercising his discretion, the Judge must apply his mind to the nature of the disability of the defendant and his chances of successfully challenging the case for the prosecution, and if he fails to consider these matters, he has not exercised his discretion judicially. (*R. v. Webb*. C.A. (Cr. Div.)) 437
55. Trial; jury; failure to inform defendant of right of challenge; defendant represented by counsel and solicitor present in court; no challenge of juror; conviction; no prejudice to defendant; no miscarriage of justice.—On the trial of the appellant, before the jury were called into the box to to be sworn, he was not informed of his right of challenge. The appellant was represented by counsel and solicitor, who were present in court at the time and took no objection, and no challenge of any juror took place. On appeal against conviction:—*Held*: distinguishing cases where a defendant had been denied his right of challenge, there had been no prejudice to the appellant nor any miscarriage of justice, and the conviction must be affirmed. (*R. v. Berkeley*. C.A. (Cr. Div.)) 589
56. Trial; separate trials; offences of similar character; defence complete denial of incident; admissibility of evidence of sexual offence against one person not admissible on counts charging similar offences against other persons; discretion of trial Judge; Indictments Act, 1915, s. 4, sch. I, r. 3.—Evidence of a sexual offence against one person is admissible on counts charging similar offences against other persons where a question of identity, intent, system or guilty knowledge arises or to rebut a defence of innocent association, but it is not admissible where the defence is a complete denial that the alleged incident occurred. The appellant was charged in count 1 of an indictment with incest with his sister E in 1964, in count 2 with incest with his sister S in 1965-6, and in count 3 with incest with his sister C in 1967. The alleged offences were of the same or a similar character. The trial Judge having formed a provisional view that evidence of the alleged offence against any one sister would be evidence on consideration of the alleged offences against the other two, exercised his discretion under s. 4 of r. 3 of sch. I to the Indictments Act, 1915, by ordering the three counts to be tried together, but held that, even if his provisional view was wrong, the three counts still should be tried together:—*Held*: that though in similar circumstances it might usually be better that the counts should be tried separately, the Court of Appeal would not interfere with the exercise of the Judge's discretion in ordering a joint trial. (*R. v. Flack*. C.A. (Cr. Div.)) 445
57. Trial; summing-up; mistake as to burden of proof; correction.—If a mistake with regard to burden of proof has been made in a summing-up, it must be corrected in the clearest possible terms. (*R. v. Moon*. C.A. (Cr. Div.)) 703

CRIMINAL LAW—continued

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| 58. Trial; summing-up; standard of proof.—A summing-up is not open to appeal on the ground of misdirection or non-direction if it is brought home to the jury that they must be sure of the guilt of the defendant before they convict. (<i>R. v. Allan</i> . C.A. (Cr. Div.)) | 87 |
| 59. Trial; sexual intercourse with girl under 16; verdict of lesser offence; indecent assault; discretion of Judge; Criminal Law Act 1967, s. 6 (3).—An indictment which alleges unlawful sexual intercourse with a girl under 16 necessarily includes an allegation of indecent assault on the same girl. On an indictment alleging the major offence, it is within the discretion of the trial Judge to leave to the jury the possibility of conviction of the lesser offence even though the prosecution have not referred to it, and he should do so whether there is plain evidence of the lesser offence. (<i>R. v. McCormack</i> . C.A. (Cr. Div.)) | 630 |
| 60. Trial; reference by witness to prisoner's bad record; discharge of jury; discretion of Judge.—Where during the course of a trial a witness has made reference to the prisoner's previous convictions or bad record, the decision whether or not to discharge the jury is one for the discretion of the trial Judge on the particular facts, and the Court of Appeal will not lightly interfere with the exercise of that discretion. The law on this matter so laid down in <i>R. v. Weaver</i> (1967) 131 J.P. 173, should be regarded as overruling earlier authorities to the effect that a jury ought almost invariably to be discharged in those circumstances. (<i>R. v. Palin</i> . C.A. (Cr. Div.)) | 668 |

CUSTOMS AND EXCISE

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|---|-----|
| 1. Goods chargeable to duty; concession enabling goods to be imported duty free for use by United States forces; goods given away by United States serviceman; Customs and Excise Act, 1952, s. 304.—The first appellant, a United States serviceman, gave to the second appellant cigarettes, wine and spirits which had been imported free of duty into the United Kingdom under a concession allowed in respect of goods for use by the United States forces. The appellants were convicted of being knowingly concerned in dealing with goods which were chargeable with duty which had not been paid, with intent to defraud the Crown, contrary to s. 304 of the Customs and Excise Act, 1952:— <i>Held</i> : as the goods were chargeable with duty under ss. 1, 3 and 4 of the Finance Act, 1964, they were "goods chargeable with a duty which has not been paid" within the meaning of s. 304 of the Act of 1952; as the concession was based on an agreement and not on statute, it could not have the effect of causing the goods to cease to be chargeable, whatever its terms, and the limits of the concession were relevant only to the issue of intent to defraud; nor did the goods cease to be chargeable because, by reason of the concession, the Customs and Excise did not collect the duty on them; therefore, the convictions were right. (<i>R. v. Berry</i> . <i>R. v. Stewart</i> . C.A. (Cr. Div.)) | 234 |
| 2. Offence; export; being knowingly concerned in the exportation of goods with intent to evade prohibition; one single question involved; burden of proof; Customs and Excise Act, 1952, s. 56 (2), s. 290 (2).—By s. 56 (2) of the Customs and Excise Act, 1952: "Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade" the statutory prohibition against their exportation shall be liable to a penalty. The respondent, C, who was a director of the respondent company, purchased a goblet for S, an American, who at all material times resided in America. S instructed the respondent company to export the goblet to him in America. The exportation of | |

CUSTOMS AND EXCISE—*continued*

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the goblet without a licence was prohibited by the Export of Goods (Control) Order, 1955. The respondent knew this, informed S, and attempted to get a licence. S later instructed the respondent to hand the goblet without a licence to one JS, who would take it with him to America by air. An information was preferred against the respondent and the respondent company, charging them with being knowingly concerned in the exportation of the goblet with intent to avoid the prohibition on export, contrary to s. 56 (2) of the Customs and Excise Act, 1952. The justices found that, on the night before the aircraft on which JS was travelling left for America, the respondent handed the goblet to him, knowing that he was going to attempt to export it without a licence, but they acquitted both the respondent and the respondent company of the offence charged. On appeal by the prosecutor:—*Held*: under s. 56 (2) one question only had to be answered, namely, whether C was knowingly concerned in the exportation of the goblet with intent to evade the prohibition; the justices had divided the words of the section and considered whether he was knowingly concerned with the exportation, and, having come to the conclusion that he was not, they found it unnecessary to consider whether, if he were, it was with intent to evade; the case would be sent back to the justices to apply their minds to the proper question. *Per Curiam*: Despite s. 290 (2) of the Act, the burden of proving the requisite knowledge and intent remained on the prosecution and did not shift. (*Garrett v. Arthur Churchill (Glass), Ltd. and Another. Q.B.D.*)

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D

DANGEROUS DRUGS

1. Offence; cannabis; management of premises used for purpose of smoking cannabis; need to prove *mens rea*; "purpose"; Dangerous Drugs Act, 1965, s. 5 (b).—By s. 5 of the Dangerous Drugs Act, 1965: "If a person . . . (b) is concerned in the management of any premises used for [the purpose of smoking cannabis] he shall be guilty of an offence . . ." This provision does not create an absolute offence, and, therefore, a person charged under it cannot be convicted without proof of *mens rea*; the purpose mentioned in para. (b) is not the purpose of the smoker, but is the purpose of the manager of the premises or a purpose known to and acquiesced in by him. (Sweet & Parsley. H.L.) . . . 188
2. Unauthorized possession; car stopped by police; defendant passenger in car; tube found under dashboard; droplets of heroin discernable microscopically only and not to naked eye; droplets impossible to measure or pour out; Dangerous Drugs (No. 2) Regulations, 1964, reg. 3.—A car in which the appellant was a passenger was stopped by the police, and under the dashboard were found a hypodermic syringe and a small tube which contained a few droplets of heroin that were discernible microscopically only and not to the naked eye and impossible to measure or pour out. The appellant, when told that other passengers in the car had admitted taking drugs, replied: "You'll have to go on what they say. I had a fix, but I'm not dropping them." The appellant was charged with possessing dangerous drugs, contrary to reg. 3 of the Dangerous Drugs (No. 2) Regulations, 1964. The prosecution presented their case on the basis that the appellant was in possession of the drug at the time when the police discovered the tube under the dashboard:—*Held*: as the tube was in reality empty it was impossible to say that there was any evidence that it contained a drug at the time when the police discovered it, and as the case for the prosecution had been based on possession by the appellant at that time, the conviction must be quashed; if the case had been based on possession by the appellant at some time prior to arrest, his statement, plus the presence of the tube which had contained the drug, would have been very strong evidence against him. (R. v. Worsell and Others. C.A.(Cr. Div.)) . . . 503
3. Unauthorized possession; evidence; 307 grains of cannabis resin found in passage leading to appellant's flat; traces in pipes and pouch found in flat; no investigations of scientific evidence relating to traces.—In a passage leading to the appellant's flat a television set was found inside which was a bag bearing the appellant's name and containing a package containing 307 grains of cannabis resin. In the flat were found pipes and a tobacco pouch with traces of cannabis and cannabis resin, but there was no scientific evidence as to the amount of the drugs. On a charge against the appellant of being in unauthorized possession of approximately 307 grains of cannabis resin, the prosecution contended that the appellant was in possession of (i) the cannabis resin found in the television set; (ii) the traces found in the pipes and pouch; and (iii) other cannabis resin, as a result of inferences properly to be drawn from (i) and (ii). The jury returned a verdict of guilty:—*Held*: the charge in the indictment was framed in words wide enough to cover the case presented by the prosecution, and the proper inference was that the jury had found that the charge of possessing approximately 307 grains of cannabis resin was proved. (R. v. Frederick. C.A.(Cr. Div.)) . . . 698
4. Unauthorized possession; small particles of cannabis capable of being weighed and measured; Dangerous Drugs (No. 2) Regulations, 1964 (S.I. 1964 No. 1811), reg. 3.—The appellant was in possession of clothes

DANGEROUS DRUGS—*continued*

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in which were found small scrapings of cannabis capable of being weighed and measured:—*Held*: as the cannabis found was capable of being weighed and measured, as a matter of law there was possession of cannabis by the appellant which would justify his conviction of being in possession of the drug contrary to reg. 3 of the Dangerous Drugs (No. 2) Regulations, 1964. *R. v. Worsell*, p. 503, *ante*, distinguished. (*R. v. Graham*. C.A.(Cr. Div.))

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E

EDUCATION

1. Local authority; negligence; child aged five years; mother informed of time leaving school at end of day; child released earlier without notice to mother; injured in traffic accident while walking home alone.—At a school conducted by the respondents as local education authority, which was attended by the appellant, a girl aged five years and two and a half months, there was a procedure devised for the protection of children of the appellant's age from danger from traffic when they left school in the afternoon. The end of school hours was fixed at 3.30 *p.m.*, and the mothers were told that they should be outside the school at the time to meet their children. When 3.30 *p.m.* arrived a teacher would lead the children across the playground and open the gate leading to the street to enable the children to join their mothers or other persons sent to meet them. On the day when the accident occurred which gave rise to the present action the children were released at or about 3.25 *p.m.* As a result the appellant's mother had not arrived to take charge of her when she left the school grounds, the appellant started to walk home alone, and, trying to cross a main road near the school, was knocked down and injured by a lorry:—*Held*: the respondents were liable for negligence on the part of their servants, the teachers responsible, in releasing the appellant from the school before the customary time without notice to the appellant's mother. (*Barnes v. Hampshire County Council*. H.L.)
2. Negligence; supervision of children; playground before commencement of school; flint wall; injury to child while playing; Standards for School Premises Regulations, 1959, reg. 51.—Children regularly arrived at a local authority primary school at between about 8.15 *a.m.* and 8.45 *a.m.* and then played in the playground without supervision until 8.55 *a.m.* when school began. The playground was surrounded by a wall which was made up of jagged flints. There had been previous accidents to children who had tripped, fallen or run against the wall. The plaintiff who was aged 8 years arrived early at school, and while playing in the playground before school began he fell and struck his head against the wall, suffering severe injuries. In an action by him against the local authority alleging negligence:—*Held*: (i) the risk of such an accident was a reasonably foreseeable risk against which the defendants could and should have guarded either by rendering the wall or by putting up railings or netting, or they should have ensured that there was proper supervision during the time when children were in the playground before the start of school; (ii) the defendants were not liable under reg. 51 of the Standards for School Premises Regulations, 1959, because the boundary wall was not part of the building for the purposes of those regulations. (*Ward v. Hertfordshire County Council*. Q.B.D.)
3. University; failure to pass examination; students required to withdraw; natural justice; right of student to be heard before decision.—The applicants R and P were students at a university and were reading for

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EDUCATION—*continued*

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the degree of B.Sc. with honours. At the end of the first year of their course in June, 1967, both passed examinations in the three major subjects of their course, but P failed in one and R in both of the subsidiary subjects. They were allowed to sit in September, 1967, for "referred examinations" in these subjects, but both failed badly. The Senate, which was the supreme academic authority and as such empowered to make regulations for the education and discipline of students, had provided by reg. 4 that "students who fail in . . . a referred examination may at the discretion of the examiners re-sit the whole examination or may be required to withdraw from the course". After the applicants' failure in the referred examinations, the examiners met and considered not only the applicants' academic achievements, but also a number of personal factors, and resolved that they be asked to withdraw from the course. The applicants were informed of this decision by letter dated September 20, 1967, but prior to this had not been given any chance to make representations to the examiners. After the examiners' decision had been reviewed by a number of other bodies, it was confirmed by the Senate in November, 1967, and by the University Council in December, 1967. In July, 1968, the applicants applied for orders for *mandamus* to re-admit them to the university and for *certiorari* to quash the decision of the Senate, confirmed by the Council. No reason was given for the delay and as R was no longer interested in returning to the university, his case was not pressed:—*Held: per DONALDSON and BLAIN, JJ.:* on a construction of the regulations, the decision whether a student who had failed in a referred examination should re-sit the whole examination or be required to withdraw from the course was in the discretion of the examiners alone; that, in exercising this discretion, the examiners were obliged to observe the rules of natural justice; but that the rule *audi alteram partem* does not apply in every case where the rules of natural justice are applicable. *Per the WHOLE COURT:* since the examiners had not confined themselves to a consideration of the applicants' academic achievements, but were prepared to take into consideration the personal problems and difficulties of each student, natural justice required that the student should be given an opportunity of being heard, orally or in writing; this had not been done, and the rules of natural justice had not been observed; but, as the granting of the prerogative remedies was discretionary, in view of P's delay in approaching the court, his application must be refused. (*R. v. Senate of the University of Aston. Ex parte Roffey and Another. Q.B.D.*)

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ELECTIONS

Local government; London borough; discrepancy between figures announced and votes cast; offence in relation to ballot papers; application for order and inspection; desire to institute prosecution; London Borough Council Elections Rules, 1968, r. 49 (1) (b).—When the voting results in three wards in a London borough were published, in two of the three wards the published results showed excesses of 32 *per cent.* and 8½ *per cent.* respectively over the votes cast, and in the third ward a deficiency of 20 *per cent.* The appellants, who were a ratepayer and an unsuccessful candidate in one of the wards, applied to the county court Judge for an order under r. 49 (1) (b) of the London Borough Council Election Rules, 1968, that an inspection of the counted ballot papers should be made if the Judge was satisfied that the order was required for the purpose of instituting or maintaining a prosecution of an offence in relation to ballot papers. The Judge refused to make the order on the ground that the offence in respect of which the prosecution

ELECTIONS—*continued*

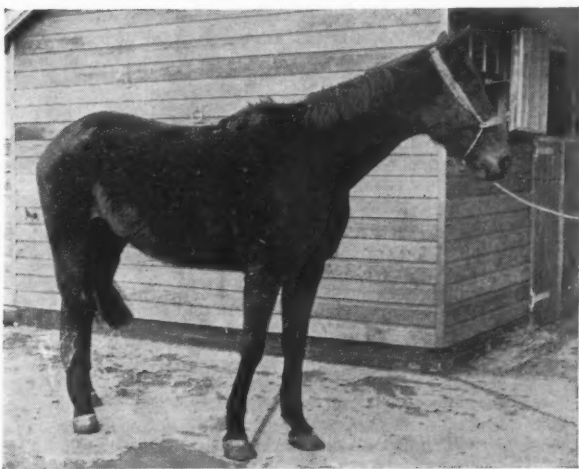
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was sought under s. 51 of the Representation of the People Act, 1949, was not an offence "in relation to ballot papers" and, alternatively, that the order asked for was not "required" for the purpose of instituting or maintaining a prosecution having regard to the evidence available. He added that, had he held otherwise, he would, in the exercise of his discretion have refused the order on the ground, *inter alia*, of preserving confidence in the secrecy of the ballot. On appeal:—*Held*: the appeal must be allowed, since (i) the figures showed that someone might have been guilty of a grave dereliction of duty in relation to the counting of votes on ballot papers, which would be an offence "in relation to ballot papers"; (ii) the order was required to enable the votes to be recounted, because until the recount took place it was impossible to particularize the dereliction of duty or the act or omission within s. 51 which constituted the offence, or who should be prosecuted; (iii) the desire of secrecy was irrelevant, because there could not be any secrecy in the totality of the votes as opposed to how any particular person voted. (*McWhirter and Another v. Platten*. Q.B.D.)

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EXCHANGE CONTROL

Export of goods; prohibited destination; condition precedent as to prior payment not fulfilled; ultimate destination; Southern Rhodesia or South Africa; goods consigned to South Africa for re-consignment to Southern Rhodesia; Exchange Control Act, 1947, s. 23 (1), (4); Customs



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EXCHANGE CONTROL—*continued*

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and Excise Act, 1952, s. 56 (1).—The appellants had for many years supplied superheaters and accessories to Rhodesia Railways. Between 1942 and 1962 goods were ordered and supplied through S, the appellants' representatives in South Africa, but from 1962 to 1965 the appellants had usually dealt direct with Rhodesia Railways. In November, 1965, the government of Southern Rhodesia made a unilateral declaration of independence, and as a result of various statutory instruments made soon thereafter, Southern Rhodesia was excluded from the scheduled territories. Accordingly, under s. 23 (1) of the Exchange Control Act, 1947, exports of goods to Southern Rhodesia were prohibited unless the Commissioners of Customs and Excise were satisfied that payment had been made in advance and in the prescribed manner. At the time there were outstanding six orders placed by Rhodesia Railways directly with the appellants, and one placed with the appellants through S. The appellants arranged that the outstanding orders placed by Rhodesia Railways direct with them should be cancelled and that orders placed through S should be substituted. These orders were sent c.i.f. Port Elizabeth, instead of f.o.b. Mersey port. At Port Elizabeth the goods were kept in bond and re-marked and re-consigned to Rhodesia Railways, and the same procedure was followed with regard to subsequent orders. Informations were preferred against the appellants charging them with exporting goods the ultimate destination of which was Bulawayo, contrary to s. 23 (1) of the Exchange Control Act, 1947, so as to render them liable to penalties under s. 56 (1). The magistrate held that the ultimate destination of the goods was Bulawayo and that the offence had, accordingly, been committed, and on appeal by the appellants quarter sessions took the same view and confirmed the convictions. On appeal by the appellants to the Divisional Court:—*Held*: that the convictions were right, inasmuch as the ultimate destination of the goods was Bulawayo, because (*per* LORD PARKER, C.J.) the question of the ultimate destination of the goods could not be confined to the strict contractual position, and that, let alone intention or contemplation or anything less, the whole object of the transaction was that the goods should go to Bulawayo; (*per* BLAIN, J.) it was always the intention of the appellants at the time of exportation that the goods should go to Bulawayo, and Bulawayo was, accordingly, the destination, or if not, it certainly was the ultimate destination; (*per* DONALDSON, J.) the true test under s. 23 (1) of the Act of 1947 was the contemplated rather than the intended destination, and the appellants always intended and contemplated that the goods would go to Southern Rhodesia as part of a continuous transit from the United Kingdom. (*Superheater Co., Ltd. v. Commissioners of Customs and Excise. Q.B.D.*)

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EXTRADITION

1. Arrest; termination if condition in treaty not satisfied within "three month"; calendar months.—By art. 15 of the Extradition Treaty entered into between Great Britain and Greece in 1910: "If a fugitive criminal who has been arrested has not been surrendered . . . within three months after his arrest . . . he shall be set at liberty".—*Held*: while the meaning of language used in a treaty was not to be interpreted as if an Act passed in the territory of one of the Powers governed it, it did not follow that a rule of construction applicable under the law of one Power in relation to legal documents, *e.g.*, the English common law rule that "month" means lunar month, was to be applied in relation to it; in each case the intention of the treaty must be considered. (*Athanassiadis v. Government of Greece. H.L.*)

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EXTRADITION—continued

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2. *Autrefois convict*; conviction of armed robbery; fresh charge of aggravated burglary.—In November, 1968, the appellant pleaded guilty in Louisiana, U.S.A., to attempted armed robbery and was sentenced to 18 years' hard labour. He escaped from prison and came to England in December, 1968, and was arrested in Manchester on March 9, 1969. Neither attempted armed robbery nor prison breaking were extraditable offences under English law. On March 14, 1969, proceedings were started in the State of Louisiana charging the respondent, *inter alia*, with aggravated burglary, which was an extraditable offence under English law. Proceedings for extradition were started, but the magistrate refused to commit on the ground that a plea of *autrefois convict* would be maintainable by the respondent:—*Held* (per LORD PARKER, C.J., and MELFORD STEVENSON, J.): the availability of a plea of *autrefois convict* did not depend on whether the facts examined on the trial of each of the offences were the same, but on whether the facts necessary to support a conviction for each offence were the same; (per BRIDGE, J.) armed robbery was not in law the same offence as aggravated burglary; and, therefore, the plea of *autrefois convict* would not have been available to the respondent, and the magistrate was wrong in refusing to convict. (United States Government v. Atkinson. Q.B.D.) 621
3. Conviction in foreign country; absence and lack of knowledge of defendant; conviction contrary to natural justice; tender of certificate of conviction; conclusiveness of certificate. Restrictions against surrender; fugitive not to be detained or tried for offence other than extradition crime on return; presumption that foreign government will honour obligation; Extradition Act, 1870, s. 3 (2). Contumacy; absence of defendant at trial; Extradition Act, 1870, s. 26.—The applicant, who was a Greek national and a political opponent of the Greek government, was convicted in 1965 by a Greek court of obtaining money by false pretences (an extraditable offence under the extradition treaty between the United Kingdom and Greece). The conviction had taken place in the applicant's absence and without his knowledge, though a procedure for substituted service had been followed. In the extradition proceedings a duly authenticated certificate of the conviction was tendered to the court:—*Held* (per WALLER and O'CONNOR, JJ., LORD PARKER, C.J., dissenting on this point), the certificate was not conclusive and it was possible for the court to look behind it; in the circumstances the conviction was contrary to natural justice and a nullity; and an order for the discharge of the applicant should issue:—*Held*, further, that the applicant was not entitled to release under s. 3 (2) of the Extradition Act, 1870, since the court would presume that the Greek government intended to honour its obligation under art. 7 of the extradition treaty, whereby the governments concerned undertook not to detain or try a fugitive who had been returned for an offence other than the offence for which he had been extradited. *Held*, further, that the conviction was not for contumacy within s. 26 of the Act. (R. v. Brixton Prison Governor. *Ex parte* Kotronis. Q.B.D.) 674
4. Fugitive offender; charge of conspiracy in Canada to defraud public; inducement to United States residents to purchase shares in company; false description of assets; relevant offence; whether offence triable under English law in corresponding circumstances; Fugitive Offenders Act, 1967 s. 3 (1).—At the request of the Canadian government the applicant was arrested in the United Kingdom and an order under the Fugitive Offenders Act, 1967, was made for his detention pending his extradition to Canada. The order related to eight charges, number 1 of which charged conspiracy to defraud the public of \$100,000,000 by

EXTRADITION—*continued*

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inducing persons, through the use of the mails and telephone services to purchase shares of two companies which did not have the attributes ascribed to them by the defendants or their agents. The evidence disclosed that the descriptions of the assets were completely false. Contact had been made by mail and telephone from Canada with persons resident in the United States, who were invited to purchase the shares and send their cheques to addresses either in Panama or Nassau, but some of the cheques were sent back to Canada. On the question whether extradition of the appellant should be ordered in respect of charge number 1:—*Held*: (i) the charge disclosed a “relevant offence” within the meaning of s. 3 (1) of the Act of 1967, because it disclosed both an offence under Canadian law and an offence which would have been an offence under the law of England if the conspiracy had been made in corresponding circumstances; but (ii) the indictable offence was the inducing of residents in the United States to buy shares, and that as the cheques were obtained from them either when they were posted in the United States, or, at the latest, when they were received either in Panama or Nassau, the offence was complete at that point; (iii) accordingly, as the only acts which took place in Canada were the printing of the circulars, the typing and posting of the letters, the making of phone calls and the ultimate collection of the cheques, there was not sufficient evidence to warrant, in corresponding circumstances, the trial of the offence under English law, on the general principle that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie here; accordingly, the applicant would not be returned to Canada in respect of charge number 1. (*R. v. Brixton Prison Governor. Ex parte Rush. Q.B.D.*)

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5. Person accused or convicted of offence within territory of State seeking extradition; “within territory”; evidence.—By art. 1 of the Extradition Treaty entered into between Great Britain and Greece in 1910, provision was made for the extradition of persons accused or convicted of certain crimes or offences “committed in the territory of the one party” to the treaty:—*Held*: to bring a case within this article it must appear on the evidence that the offence was committed within the territory of the State seeking extradition; it was not sufficient that the evidence was consistent, or not inconsistent, with the offence having been committed within that territory. (*Athanassiadis v. Government of Greece. H.L.*)

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6. Time of charge; fugitive not charged at time of arrest in United Kingdom; fugitive charged at time when requisition for extradition received; oppression; crime based on same facts as crime for which applicant previously convicted; United States of America (Extradition) Order in Council 1935, art. 1.—In November, 1968, the applicant pleaded guilty in Louisiana, U.S.A., to attempted armed robbery and was sentenced to 18 years’ hard labour. He had fired shots at certain persons in the course of committing the offence. In December, 1968, he escaped from prison, came to England, and was arrested in Manchester on March 9, 1969. As neither the offence of attempted armed robbery nor the offence of prison breaking was extraditable under the law of England, the United States government sought to extradite him on fresh charges of attempted murder and aggravated burglary arising out of the same incident. The fresh charges were not preferred until March 14. On May 2 the applicant was committed to prison. On an application by the applicant for *habeas corpus*:—*Held*: the application must be refused, because (i) since the charges had been preferred at the time when the requisition for extradition was made, the applicant was a

EXTRADITION—*continued*

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"person, who being accused [was] found within the territory of the [United Kingdom]" within the meaning of art. 1 of the Extradition Treaty of 1931 between the United Kingdom and the United States of America; (ii) it was no part of the magistrates' duty to consider whether the fresh charges laid were oppressive as having been founded on the same facts as the charge to which the applicant had originally pleaded guilty. *Per Curiam*: The court will assume that a friendly State will observe the conditions of an extradition treaty. (*R. v. Brixton Prison Governor. Ex parte Atkinson. Q.B.D.*)

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H

HABEAS CORPUS

Grant of writ; illegality of detention of applicant; application based on illegality; technicality.—An application for a writ of *habeas corpus* should not necessarily be granted where the ground of the application is the illegality of the detention of the applicant and that ground is based on a mere technicality not affecting the merits of the case. (*Athanassiadis v. Government of Greece. H.L.*)

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HIGHWAYS AND FOOTPATHS

1. Highway; boundary; road running between fences; presumption; rebuttal.—The L council, as highway authority, had vested in it a road which had been an ancient coal road. The metalled portion in the material stretch ran east to west and was about 20 ft. wide. On April 21, 1938, the defendant bought a house on the north side of the road. Opposite this house, on the south side of the road, was a grass verge, which ran westwards about 200 ft., was some 40 ft. wide, and was bounded on the south side by an ancient hedge with a ditch in front of it on the road side. The council claimed that the verge was part of the highway. The verge did not belong to the adjoining owner on the south and no evidence was adduced to show a paper title of any kind. The court found that no act of independent ownership or right of user had been proved by either side. The council relied on a presumption that, as the road ran between fences on either side, the whole space between was highway. The defendant conceded that, to a depth of 10 ft., the part of the verge adjoining the metalled part of the road was part of the highway, but denied the claim to the remainder. On argument as to the precise nature and effect of the presumption relied on by the council:—*Held*: the mere fact that a road ran between fences or hedges did not *per se* give rise to any presumption that the right of way, and therefore, the highway, extended to the whole space between the fences; first it must be decided as a preliminary question whether those fences had been put up by reference to the highway that was to separate the adjoining land from the highway or for some other reason; that question was to be decided in the sense that the fences did mark the limit of the highway unless there was something in the condition of the road or the circumstances to the contrary; thereafter, a rebuttable presumption of law arose which supplied any lack of evidence of dedication in fact or inferred from user that the public had right of passage and, therefore, the highway extended to the whole space between the fences and was not confined to such part as might have been made up; in the present case, there being no evidence to the contrary, the highway extended to the whole space between fences and the verge was part of the highway. *Per Curiam*: The fact that, since 1960 or even before, the defendant had been rated in respect of his occupation of the verge was irrelevant [to the issue of ownership], both because the highway authority was not the rating authority, and because the latter was

HIGHWAYS AND FOOTPATHS— <i>continued</i>	PAGE
concerned only with occupation and not whether it was lawful. (Attorney-General v. Beynon. Ch.D.)	349
2. Highway; non-repair; liability of highway authority; flooding; Highways (Miscellaneous Provisions) Act, 1961, s. 1.—By s. 1 (1) of the Highways (Miscellaneous Provisions) Act, 1961: "The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated." In proceedings brought under this subsection neither the occasional flooding of a stretch of road nor the mere presence of a pool of water on the road on a particular occasion can be relied on of itself to show failure on the part of the highway authority to maintain. (Burnside and Another v. Emerson and Others. C.A.)	66
HUSBAND AND WIFE	
1. Appeal; Divisional Court; procedure; notice of appeal; R.S.C., Ord. 55, r. 3 (2).—A notice of an appeal to a Divisional Court from an order of magistrates in a matrimonial case must specify the parts of the order complained of, what facts the appellant alleges ought to have been found, and what error has been made in point of law, whether the point was raised in the court below or not. If improper admission or rejection of evidence is alleged the evidence must be specified. (Johnson v. Johnson. P.D.A.)	431
2. Charges of adultery, reasonable belief in adultery, and conduct amounting to expulsive conduct; need for particulars of charges.—Where, in a matrimonial case before justices, one spouse's case is that the other spouse has committed adultery, or that the complaining spouse has reasonable grounds for believing that adultery has been committed, or that a male spouse has been guilty of conduct in relation to women so inconsistent with the married relationship as to amount to expulsive conduct, particulars of the charge must be given to the party charged by the party making the charge. <i>Per</i> SIR JOCELYN SIMON, P.: The reason why particulars of adultery must be given, however the case is framed, are twofold. In the first place, a third party may well be concerned and it may well be that the third party will be needed as a witness, and, secondly, any case of adultery raises inevitably a whole number of concomitant questions, like condonation, connivance, and conduct conducing. The rule is not confined to an allegation of adultery, but extends to where a party's case is based on a reasonable belief in adultery. However that contention is framed or however it arises, notice must be given that that is the case. It need not be particularised in the same detail as an actual charge of adultery, but sufficient notice of it must be given so that the spouse who is charged knows what case he has to meet, that any party involved can be called as a witness, and that all parties and the court are alerted as to issues of condonation, connivance, or conduct conducing. It is not sufficient to make an oral communication. When the case is neither adultery nor a reasonable belief in adultery, but a charge of conduct in relation to other women so inconsistent with the married relationship as to amount to expulsive conduct I am very reluctant to impose on parties before a magistrates' court the burden of detailed pleadings, but I think the same reasoning that applies to notice of a charge of adultery or of a charge of reasonable belief in adultery applies equally to this third category of conduct. (Hind v. Hind. P.D.A.)	293
3. Maintenance; amount; consideration of all relevant circumstances; standard of support for wife; encumbrances existing at time of marriage; obligations of second marriage.—A court, when fixing the amount of	

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HUSBAND AND WIFE—*continued*

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maintenance or permanent alimony, is bound to have regard to all the relevant circumstances of each particular case, including obligations and advantages which may not be legally enforceable. An innocent wife is generally entitled to be supported at a standard as near as possible to that which she enjoyed before cohabitation was disrupted by the husband's wrongful conduct. In any case she ought not to be relegated to a significantly lower standard than that which her husband enjoys, and she ought not to be forced to have recourse to supplementary benefit from the Ministry of Social Security unless her husband and his household are also at subsistence level. On general principle a spouse must on marriage be presumed (except in cases falling within s. 9 of the Matrimonial Causes Act, 1965) to take the other subject to all existing encumbrances, whether known or not, *e.g.*, a charge on property, an ailment which impairs earning capacity, or an obligation to support the wife or child of a dissolved marriage. So long as an aggrieved wife has a choice whether or not to seek dissolution, so long as she has alternative remedies, there is no injustice in requiring the court to take into account obligations from a second marriage, particularly if the just claims of the first wife are not, in any event, to be ignored. It must be rare, however, when the aggrieved wife has sought an alternative remedy, for it to be right that her claim to support should be postponed to the claim of a mistress, even though this must be taken into account for whatever weight it is held to bear. (*Roberts v. Roberts*. P.D.A.) 8

L

LAND DRAINAGE

Rating; exemption; "portion" of district of drainage board; mine workings; no benefit from drainage of district; Land Drainage Act, 1930, s. 24 (7).—Mine workings 1,300 ft. below ground held (by LORD DENNING, M.R., and DAVIES, L.J., WIDGERY, L.J., *dissentiente*) to be a "portion of the district" of a drainage board within s. 24 (7) of the Land Drainage Act, 1930, and so, if they got no benefit from the drainage of the district, might be wholly exempted by order of the drainage board from drainage rating. (*R. v. Trent River Authority and Another*. *Ex parte* National Coal Board. C.A. (Civ. Div.)) . . . 289

LOCAL GOVERNMENT

1. Election; urban district councillor; nomination; signature of elector to nomination paper; usual signature; signature not corresponding to form of elector's name in electoral register; Urban District Council Election Rules, 1951, sch. 1, r. 9 (2) *Appendix*.—The signature of an elector who subscribes the nomination paper of a candidate for election as an urban district councillor is, as required by the Urban District Council Election Rules, 1951, his usual signature, and it is immaterial that this signature does not correspond with the form in which the elector's name is shown in the electoral register. (*Re Melton Mowbray* (Egerton Ward) U.D.C. Election. Q.B.D.) 30
2. Officer employed in county council valuation panel; retirement compensation; reorganization in London pursuant to Act of 1963; officer made redundant at age of 60; normal retiring age 65; basis of compensation; whether on actual average salary during last five years before retirement or on national average of five years between ages of 60 and 65; Local Government Superannuation Act, 1937, s. 8 (5); Local Government (Compensation) Regulations, 1964, reg. 2 (1).—The respondent had been employed in local government service from 1923 to March, 1967, and during the last 17 years had been an officer of a county council

LOCAL GOVERNMENT—continued

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valuation panel. As a result of reorganization in the London area pursuant to the London Government Act, 1963, he was made redundant on March 31, 1967, when he had attained the age of 60. He had by then become entitled to the maximum salary. If he had not been redundant as heretofore stated, his normal retiring age would have been 65. He had become entitled, *inter alia*, to retirement compensation under part 5 of the Local Government (Compensation) Regulations, 1964. By reg. 20 (1) (a), as a pensionable officer, his retirement pension was to be "an annual sum equal to the amount of his accrued pension". By reg. 2 (1) "accrued pension" meant "the pension to which he would have become entitled" if at the date on which he ceased to be subject [to the scheme] he had attained normal retiring age. The pension scheme was subject to the Local Government (Superannuation) Act, 1937, s. 8 (5). Under that subsection the respondent's pension was to be calculated on "the annual average of the remuneration received by him in respect of service rendered during the five years immediately preceding the day" of his retirement. The Industrial Tribunal awarded him a retirement pension based on the average salary he would have received for the five years preceding the date when he would become 65. On appeal by the Minister of Housing and Local Government:—
Held: the decision of the tribunal was wrong because on the construction of reg. 2 (1), so far as the quantum of payment was concerned, that had to be based on actual facts and actual payments, although it was only a notional figure by reason of the fact that it had to be assumed that the respondent had attained the age of 65; no assumption was to

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LOCAL GOVERNMENT—*continued*

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- be made that the average was to be calculated on the basis that the respondent had for the preceding five years reached the salary that he would have earned if he had continued to work till he was 65. (Minister of Housing and Local Government v. Lambert. Q.B.D.) 311

M

MAGISTRATES

1. Binding-over; case not completed; jurisdiction of magistrate; necessity that it should have emerged that breach of the peace may occur; Justices of the Peace Act, 1361; Magistrates' Courts Act, 1952, s. 91.—An order for binding over under s. 91 of the Magistrates' Courts Act, 1952, can be made by a magistrate only after the hearing of the case has been completed, but an order under the Justices of the Peace Act, 1361, can be made at any time during the proceedings, subject to an opportunity being given to the defendant or his advisers to argue against it. There is, however, no jurisdiction to make such an order unless the proceedings have reached a stage where it has emerged that there may be a breach of the peace in the future. (R. v. Aubrey-Fletcher. *Ex parte* Thompson. Q.B.D.) 450
2. Case Stated; extradition proceedings; refusal to commit; competence of appeal; Magistrates' Courts Act, 1952, s. 87 (1).—Where a magistrates' court has refused to commit in proceedings under the Extradition Act, 1870, an appeal lies from their decision by way of Case Stated, by virtue of s. 87 (1) of the Magistrates' Courts Act, 1952. (United States Government v. Atkinson. Q.B.D.) 621
3. Committal for sentence; bail; rarely to be granted; Magistrates' Courts Act, 1952, s. 29, as amended by Criminal Justice Act, 1967, s. 103, sch. 6.—On a committal for sentence under s. 29 of the Magistrates' Courts Act, 1952 (as amended) the power to admit the offender to bail should be rarely exercised. The limitations imposed by s. 18 of the Criminal Justice Act 1967, on the power to remand in custody do not apply to committal for sentence. Observations on disparity of sentence on co-defendants. (R. v. Coe. C.A. (Cr. Div.)) 103
4. Committal proceedings; order removing restrictions on publicity; formal remand proceedings; jurisdiction of magistrates; grouping of charges; no indication that order was to apply in respect of some charges only; operation of original order; Criminal Justice Act, 1967 s. 3 (2), s. 35, s. 36.—On May 9, 1968, the applicant, together with a number of other persons, was charged at a magistrates' court with a number of indictable offences. He was formally remanded until May 17 when the hearing had not proceeded beyond consideration of preliminary matters, and on the application of counsel for the applicant the magistrate made an order under s. 3 (2) of the Criminal Justice Act, 1967, removing the restrictions on publicity which would otherwise be imposed by s. 3 (1) of the Act. Nothing was said at the time by either counsel or the magistrate to indicate that the order was to apply in respect of some of the charges only and not in respect of others. There were a number of further formal remands. When the prosecution were ready to proceed with the taking of depositions, owing to the number of defendants and the number and complexity of the charges, it was decided that the depositions should be taken in eight groups of charges. Preliminary proceedings were taken in respect of seven groups, sometimes concurrently in different court rooms and sometimes consecutively over a period of time, and when the evidence on each group had been heard, the magistrate either committed for trial or refused to convict. On September 10, 1968, the eighth and last group came before a



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MAGISTRATES—continued

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- magistrate, who, after hearing argument, ruled under r. 1 (2) of the Magistrates' Court Rules 1967, that the order made on May 17 permitting publication still affected the proceedings which were about to begin before him:—*Held*: the order of May 17 was within the jurisdiction of the magistrate who made it, because, on the construction of s. 3 (2) of the Act of 1967 the jurisdiction to make such an order was not confined to the duration of committal proceedings in the sense in which the term was generally understood, and the use of the phrase "magistrates' court" indicated that it was not necessary that the court in question should be sitting as examining justices; alternatively, even if jurisdiction to make such an order did not arise until the committal proceedings had begun, under s. 35 of the Act the proceedings before the examining justices, and, accordingly, the committal proceedings as defined in s. 36, had begun on May 17; since the order of that date referred to all the committal proceedings then pending against the applicant, in respect of which he was then before the court, it included the proceedings pending on September 10. (*R. v. Bow Street Magistrate. Ex parte Kray. Q.B.D.*) 54
5. Committal proceedings; reports; publicity; order lifting restrictions on reports; order to apply to totality of proceedings; Criminal Justice Act, 1967, s. 3 (2).—An order made under s. 3 (2) of the Criminal Justice Act, 1967, that the restriction imposed by s. 3 (1) on publication of reports of committal proceedings should not apply to particular proceedings must apply to the total of those proceedings. (*R. v. Russell. Ex parte Beaverbrook Newspapers, Ltd. and Another. Q.B.D.*) 27
6. Indictable offence triable summarily; serious offence; prosecution not to invite summary trial; powers of punishment insufficient; duty of magistrates; Magistrates Courts' Act, 1952, s. 19 (2).—The prosecution does not act in the best interests of justice by inviting magistrates to deal summarily with serious indictable offences even though such a course may be convenient, and expeditious summary trial should be invited only if the magistrates' powers of punishment appear sufficient. In the case of indictable offences the duty of magistrates is to begin to inquire into the matter as examining justices and to deal with a case summarily only if it can be brought within s. 19 (2) of the Magistrates Courts Act, 1952. (*R. v. Coe. C.A. (Cr. Div.)*) 103
7. Information; no offence disclosed; information void *ab initio*; no power to cure by amendment; Poaching Prevention Act, 1862, s. 2; Magistrates' Courts Act, 1952, s. 100 (1).—By s. 2 of the Poaching Prevention Act, 1862: "It shall be lawful for any constable . . . in any highway . . . to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game . . . and having in his possession any game unlawfully obtained, or any gun . . . used for the killing or taking game, and also to stop and search any . . . conveyance in or upon which such constable . . . shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person . . . or . . . conveyance, to seize and detain such game, article, or thing; and such constable . . . shall in such case apply to some justice of the peace for a summons citing such person to appear before [justices] as provided in [s. 9 of the Criminal Justice Act, 1855] . . . and if such person . . . shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay [a penalty] and shall forfeit such game, guns . . ." By s. 100 (1) of the

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- Magistrates' Courts Act, 1952: "No objection shall be allowed to any information . . . for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant . . . at the hearing of the information . . ." The appellant preferred an information against the respondent alleging that, in pursuance of s. 2 of the Poaching Prevention Act, 1862, as a police officer he lawfully searched on the highway the respondent whom he had good cause to suspect of coming from certain land where he had been unlawfully in search or pursuit of game and having in his possession game unlawfully obtained or a gun or cartridges, and that on the search there were found on the respondent pheasant feathers, and a gun and cartridges which the appellant then and there seized and detained in pursuance of s. 2. At the hearing the information was amended so as to allege that the appellant lawfully stopped and searched a van in or upon which he had good cause to suspect that game "or articles or things as aforesaid" were being carried, and that there were found in the van the articles mentioned in the information as originally framed. The information did not mention either of the substantive offences in s. 2, namely, obtaining game "by unlawfully going on any land in search or pursuit of it", or using "such article or thing . . . for unlawfully killing or taking game", or the accessory offence referred to in the section:—*Held*: the information was void *ab initio*, as it did not disclose any offence, and, being void *ab initio*, could not be cured by s. 100 (1) of the Magistrates' Courts Act, 1952. (*Garman v. Plaice*. Q.B.D.) . . . 114
8. Jurisdiction; decision on first summons; second summons; no fresh relevant evidence; application of *res judicata* doctrine.—Early in 1965 the mother of an infant was married, but she and her husband separated at the end of 1966. The infant was born on October 6, 1967. Alleging that her husband was the father of the infant, which the husband denied, the mother took out a summons under the Guardianship of Infants Acts for the custody and maintenance of the infant. At the hearing of this summons on May 20, 1968, the only evidence given was that of the mother and the husband. It was very contradictory, but the justices concluded that the husband's evidence was the more reliable and made no order on the summons. Some months later the mother took out a second summons against the husband for the custody and maintenance of the infant. On February 17, 1969, this summons came before different justices who were fully informed about the hearing of the first summons, but proceeded to hear the second summons. The only evidence given was that of the mother and the husband and was in all relevant respects the same as that given at the first hearing, but an order was made granting custody of the infant to the mother and ordering the husband to pay maintenance. On appeal by the husband on the ground, *inter alia*, that the matters arising on the first summons concerning the paternity of the infant were *res judicata* and the justices had no jurisdiction to entertain a second identical summons:—*Held*: the matters arising on the first summons were not made *res judicata* by the decision of the justices and the mother was not estopped from taking out a second summons which the justices had jurisdiction to entertain, but the proper practice was that they should have stopped the hearing as soon as they became aware that no further evidence was to be adduced and that the only evidence to be had on behalf of the mother was that which had been given at the hearing of the first summons; accordingly the appeal would be allowed and the order of the justices dated February 17, 1969, set aside. (*Re F (W)* (an infant). Ch.D.) . . . 723
9. Jurisdiction; excess; *certiorari*; conviction and disqualification for holding driving licence quashed; ancillary relief; subsequent convictions

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for driving while disqualified quashed.—The applicant was convicted of motoring offences and disqualified for holding a licence for twelve months. It was not disputed that the justices had acted in excess of jurisdiction and that the conviction and order for disqualification must be quashed. During the period of disqualification the applicant pleaded guilty to driving while disqualified and was disqualified for a further five years. During that period he pleaded guilty to driving while disqualified and was disqualified for a further period of five years:—*Held*: a court must have inherent jurisdiction to give such ancillary relief as will make its orders truly effective, and *certiorari* must issue to quash the second and third disqualifications as well as the first. (*R. v. Middleton and Other Justices. Ex parte Collins. Q.B.D.*)

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10. Procedure; adjournment; review by appellate court of exercise of discretion by magistrate; refusal by magistrate to grant adjournment of hearing in absence of party.—On January 9, 1967, an order was made by the stipendiary magistrate at Manchester under the Guardianship of Infants Act, 1886, and the Guardianship and Maintenance of Infants Act, 1951 (as amended), giving the custody of the child of the marriage to the mother, with access, precisely defined, to the father. In November, 1967, non-compliance as to access was alleged by the father who made a complaint which was served on the mother. On November 27, 1967, the mother wrote a letter to the chief constable expressing her inability to attend the hearing, which had been fixed for November 29, 1967, and asking for an adjournment. On November 29, 1967, the stipendiary magistrate refused an adjournment, proceeded with the hearing in the absence of the mother, and under the Magistrates' Courts Act, 1952, s. 54 (3), ordered her to pay a sum of £10. On appeal by the mother:—*Held*: an appellate court ought to be very slow to interfere with the discretion of a court on such a question as the adjournment of a trial, but where the result of the order made in the court below would be to defeat the rights of the parties altogether or would be an injustice to one or other of the parties, the appellate court had power to review such an order and it was its duty to do so; accordingly, although the mother's reason for not attending the hearing was very tardy and far from convincing, the refusal of one adjournment as distinct from any further adjournment was wrong, and the appeal would be allowed. (*M (J) v. M (K). Ch.D.*)

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11. Refusal by fire authority to issue fire certificate; appeal by way of complaint to justices; complaint dismissed by justices; right of appeal to quarter sessions; Offices, Shops and Railway Premises Act, 1963, s. 72.—Where magistrates have dismissed a complaint by the owners of premises by way of appeal against the refusal of a fire authority to issue a fire certificate, the owners have a right of appeal to quarter sessions, since the dismissal of the complaint by the justices is "an order made by a magistrates' court on determining a complaint" from which a right of appeal to quarter sessions is provided by s. 72 of the Offices, Shops and Railway Premises Act, 1963. (*R. v. Recorder of Oxford. Ex parte Brasenose College. Q.B.D.*)

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MENTAL HEALTH

Home for mentally retarded children; registration; "refusal to re-register"; application to local authority for permission to accommodate more children; permission to accommodate fewer children than requested; National Assistance Act, 1948, s. 37 (3); Mental Health Act, 1959, s. 20.—The appellants, a charity, maintained three homes for mentally retarded children. In July, 1966, they received a certificate stating that

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the houses had been registered pursuant to s. 37 of the National Assistance Act, 1948, as applied by part 3 of the Mental Health Act, 1959, subject to the condition that the number of persons accommodated in each house should not exceed stated numbers. In September, 1967, they applied to the local authority to have the conditions changed so as to enable them to accommodate larger numbers of children in two of the houses. In February, 1968, the local authority granted them permission to accommodate more children in each house than originally permitted, but fewer than the appellants had wished to accommodate. The appellants appealed to a magistrates' court under s. 38 of the National Assistance Act, 1948, by complaint alleging that the local authority's decision constituted an order refusing to re-register. The justices held that they had no jurisdiction to hear the complaint and dismissed it:—*Held*: that the decision of the justices was right, as the application of the appellants was not an application to re-register the premises, but an application for change in the conditions of the existing certificate of registration, and under s. 37 (3) of the National Assistance Act, 1948, an appeal lay to a magistrates' court only where there had been a refusal to register. *Per* ASHWORTH, J.: There is nothing in s. 20 of the Mental Health Act, 1959, which suggests that any conditions imposed by the local authority could be challenged. (Retarded Children's Aid Society v. London Borough of Barnet. Q.B.D.)

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P

POLICE

1. Assault; battery; apprehension of violence; *actus reus* and *mens rea*; continuing act; police officer in execution of duty.—An assault is any act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal violence. Although "assault" is an independent crime and is to be treated as such, for practical purposes today "assault" is generally synonymous with the term "battery", and is a term used to mean the actual intended use of unlawful force to another person without his consent. Where an assault involves a battery, it matters not whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. To constitute this offence, some intentional act must have been performed; a mere omission to act cannot amount to an assault. A distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault. For an assault to be committed, both the elements of *actus reus* and *mens rea* must be present at the same time. It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed on an existing act. On the other hand, the subsequent inception of *mens rea* cannot convert into an assault an act which has been completed without *mens rea*. The appellant was reversing his car from a road on to a pedestrian crossing and was directed by a police constable to drive it forward to the kerb. The constable pointed out a suitable place at which to park. At first the appellant stopped too far from the kerb, and, on a definite parking place being pointed out by the constable, drove forward and stopped the car with the offside wheel on the constable's left foot. It was not clear whether the appellant had done this intentionally or accidentally.

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The constable told the appellant to get off his foot and received abuse in return. He repeated his instructions several times and the engine of the car stopped running. At some point the appellant turned off the ignition. Finally, the appellant slowly turned on the ignition and reversed the car off the constable's foot. The appellant was convicted of assaulting the constable in the execution of his duty, contrary to s. 51 of the Police Act, 1964. On appeal:—*Held*: (BRIDGE, J. dissenting) that the conviction was right, as the conduct of the appellant could not be regarded as mere omission or inactivity; there was an act constituting a battery which at its inception was not criminal because the element of intention had not been proved, but became criminal from the moment when it was established that the intention was formed to produce the apprehension which flowed from the continuing act. (*Fagan v. Metropolitan Police Commissioner. Q.B.D.*)

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2. Arrest without warrant; essential elements; clear words to be used.—

To constitute a valid arrest without a warrant, there need not be any seizing or touching of the person whom it is intended to arrest, but clear words should be used by the arresting officer to bring to the notice of the arrested person that he is under compulsion to accompany the officer, and the simplest thing is for the officer to say: "I arrest you." It is particularly desirable that clear words should be used in circumstances in which, as the result of drink or drugs, the understanding of the arrested person may be dulled. (*Alderson v. Booth. Q.B.D.*)

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PUBLIC HEALTH

Refuse collection; means of access by which refuse removed from house; obstruction; need to prove easement; insufficiency of licence; Public Health Act, 1936, s. 55 (2).—The respondent owned a terrace house which contained a passageway running under one of the bedrooms to his back garden. There was a gate in the passageway which provided access to the back garden and therefrom to the back gardens of adjoining houses. The respondent's predecessors in title had for some years allowed the refuse collectors of the local authority to go through the passageway into his back garden and thence to the back gardens of adjoining houses. The respondent usually kept the gate in the passageway locked, but for a time opened it on each occasion when the refuse collectors came. Later, when going away on holiday, he locked the gate and put up a notice stating that thenceforward there would no longer be access for the local authority's employees through the passageway and that alternative arrangements should be made. Informations were preferred charging the respondent with closing and obstructing the means of access by which refuse was removed from houses in the road, contrary to s. 55 (2) of the Public Health Act, 1936. Justices dismissed the informations. On appeal by the prosecutor:—*Held*: nothing short of proof of an easement entitling the council's dustmen to go over the respondent's back garden would suffice to constitute a "means of access" within the meaning of s. 55 (2) of the Public Health Act, 1936; mere leave or licence was insufficient; no such easement had been proved; therefore it was impossible to say that any offence had been committed by the respondent, and the appeal must be dismissed. (*Coupe v. Barrett. Q.B.D.*)

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Q

QUARTER SESSIONS

Committal for sentence; jurisdiction of committing magistrates; "character and antecedents"; matters which may be taken into consideration;

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Magistrates' Courts Act, 1952, s. 29.—The expression "character and antecedents" in s. 29 of the Magistrates' Courts Act, 1952, is intended to be extremely wide. When deciding whether or not to commit a defendant to quarter sessions for sentence magistrates are entitled to take into consideration not merely previous convictions and offences which the defendant asks to have taken into consideration, but also matters revealed in the course of the hearing connected with the offence charged which reflect in any way of the defendant's character. (*R. v. King's Lynn Justices. Ex parte Carter and Others. Q.B.D.*)

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R

RATING AND VALUATION

1. Exemption; charitable purposes; "use" of premises; use by occupier.—

By s. 2 of the Valuation of Property (Ireland) Act, 1854, the Commissioner of Valuation is required to distinguish in the valuation list all hereditaments and tenements "used for charitable purposes" and the section provides that "all such hereditaments and tenements . . . shall, so long as they shall continue to be . . . used for the purposes aforesaid" be deemed exempt from rating. [For the corresponding provision in England, see s. 40 (1) of the General Rate Act, 1967.] The relevant use of the hereditament for determining whether a hereditament is exempted from rates within s. 2 above is that of the occupier and the relevant purposes for which the hereditament is used are those of the occupier alone. (*Northern Ireland Commissioner of Valuation v. Fermanagh Protestant Board of Education. H.L.*)

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2. Hypothetical tenancy; impending redevelopment; part of factory required for road widening; expectation of demolition in a year; effect on value taken into account; Rating and Valuation Act, 1925, s. 22 (1) (b).—In estimating the notional rent of a hereditament under s. 22 (1) (b) of the Rating and Valuation Act, 1925, and thus arriving at the rateable value of the hereditament, the reasonable anticipation of the demolition of part of the hereditament within a year should be taken into account. Decision of the Court of Appeal, 132 J.P. 49, *sub nom. Almond v. Ash Brothers & Heaton, Ltd.*, affirmed. (*Dawkins (Valuation Officer) v. Ash Brothers & Heaton, Ltd. H.L.*)

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3. Occupation; master and servant; residence by servant; "occupation" by master; matters to be taken into consideration.—If it is essential to the performance of the duties of a servant that he should occupy a particular house, or, it may be, a house within a closely defined perimeter, then, it being established that this is the mutual understanding of the master and the servant, the occupation for rating and other ancillary purposes is that of the master and not of the servant. In such a case, if the necessity for occupation is not expressed in the contract between master and servant, it must be an implied term thereof in order to give efficacy to the contract. There is also the case where it is not essential for the servant to occupy a particular house or to live within a particular perimeter, but by doing so he can better perform his duties as servant to a material degree. In such a case, if there is an express term in the contract of service that he shall so reside, the occupation for rating and ancillary purposes is treated as the occupation of the master and not of the servant. *Per LORD PEARSON*: The identification of the rateable occupier in cases such as this should depend on the dominant character and purpose of the occupation rather than the contractual arrangements. The contractual arrangements are important factors to be taken into account in deciding what is the dominant character and purpose of the occupation, but they could be

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artificially devised for securing advantages in respect of taxation or rating, and, therefore, should not be taken as affording the sole test, or necessarily test, for the identification of the rateable occupier. *Per LORD DIPLOCK*: The servant's obligation to reside must be attributable to and form an integral part of the relationship of master and servant created by a contract of employment because it is only by virtue of that relationship that the master retains sufficient control of the day-to-day use of the premises to amount to occupation of them by him in law. If the covenant by the servant to reside is collateral to the main purpose of the contract of employment, even though contained contained in the same document, it will not result in the residence of the servant being in law "occupation" of the premises by the master. If the servant has an option whether to reside or not and the duties owed by him to his employer remain the same whether or not he exercises the option, the option is collateral to the contract of employment and the legal relationship between him and his employer resulting from his exercise of the option and his acceptance of his employer's licence to occupy the premises is also collateral. (*Northern Ireland Commissioner of Valuation v. Fermanagh Protestant Board of Education. H.L.*)

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4. Rates; rateable value; evidence; actual rent; figures reached on profits or contractor's basis.—When a particular hereditament is let at what is plainly a rack rent, or when similar hereditaments in similar economic sites are so let so that they are truly comparable, that is admissible evidence of what the hypothetical tenant would pay, but it is not in itself decisive. All other relevant considerations are admissible, *e.g.*, figures reached on a profits basis or on the contractor's basis. *Per WINN, L.J.*: In the circumstances stated evidence of the actual rent should be classified in respect of cogency as a superior category of evidence. In some, but not all, cases that category may be exclusive. Any indirect evidence, albeit relevant, should be placed in a different category reference to which may or may not be proper, or indeed necessary, according to the degree of weight of the former kind of evidence. (*Garton v. Hunter. C.A. (Civ. Div.)*)

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ROAD TRAFFIC ACTS

1. Being in charge of motor vehicle with blood-alcohol proportion above prescribed limit; defence; no likelihood of driving; period to be covered; period extending as long as any probability of driving with blood-alcohol proportion above prescribed limit; Road Safety Act 1967, s. 1 (3).—On a charge of being in charge of a motor vehicle with a blood-alcohol proportion exceeding the prescribed limit contrary to s. 1 (2) of the Road Safety Act, 1967, to establish a defence under s. 1 (3) the defendant must prove that there was no likelihood of his driving so long as there was any probability of his blood-alcohol proportion exceeding the prescribed limit. (*Northfield v. Pinder. Q.B.D.*)
2. Driving licence; provisional licence; conditions attached; motor bicycle; whether "sidecar" attached; tubular steel framework without structure; no facility for safely carrying passenger; facility for carrying goods if secured; Motor Vehicles (Driving Licences) Regulations, 1963, reg. 7 (1) (d).—An informant was preferred against the respondent alleging an offence against reg. 7 (1) (d) of the Motor Vehicles (Driving Licences) Regulations, 1963, in that, being the holder of a provisional licence, he failed to comply with a provision of licence by driving a motor bicycle, not having attached thereto a sidecar, while carrying on it a person who was not a qualified driver. The respondent, who held a provisional licence only, drove a motor bicycle with a

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- passenger on the pillion seat who was not a qualified driver. Attached to the nearside of the motor bicycle was a flat tubular steel framework on which there was no bodywork, platform or structure of any kind, but there was a wheel with an inflated pneumatic tyre attached to an axle which was welded to the inside of the framework. A passenger could not safely be carried on the framework, but goods such as planks could be carried on it, if secured. The justices dismissed the information. On appeal by the prosecutor:—*Held*: the bare chassis did not constitute a sidecar; accordingly, the offence was proved; and the case must be remitted to the justices with a direction to convict. (*Cox v. Harrison*. Q.B.D.) 75
3. Driving when unfit to drive through drink; disqualification; special reasons; defendant's drink "laced" without his knowledge; prior inhalation of fumes with alcoholic content unknown to defendant; Road Traffic Act, 1960 s. 6 (1); Road Traffic Act, 1962, s. 5 (1).—Either the fact that the defendant's drink has been "laced" without his knowledge, or the fact that, prior to consuming a small quantity of alcohol he had inhaled fumes with an alcoholic content of which he was unaware, can amount to a special reason justifying a court from ordering disqualification for holding a driving licence in a case where, in the absence of a special reason, disqualification would be obligatory. (*Brewer v. Metropolitan Police Commissioner*. Q.B.D.) 185
4. Driving with blood-alcohol proportion above prescribed limit; breath test; approval of Secretary of State for device used; proof; consignment note relating to delivery of device to police; "record relating to trade or business"; Criminal Evidence Act, 1965, s. 1 (1) (a); Road Safety Act, 1967, s. 7 (1).—On a charge of driving a motor vehicle with a blood alcohol concentration exceeding the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, the defence took the point that the prosecution had not proved, as was required by s. 7 (1) of the Act, that the breathalyser used for the breath test was a device approved by the Secretary of State. The recorder (wrongly, as was admitted by the prosecution on appeal) held that a label inside the lid of the testing set was admissible evidence to prove approval. The appellant was convicted. On the appeal the Crown sought to rely on a consignment note relating to the delivery of the device to the police force concerned which stated that the goods had been sent from a Home Office supply and transport store, and contended that it was admissible as a commercial record under s. 1 (1) (a) of the Criminal Evidence Act, 1965, to prove the Secretary's approval of the device:—*Held*: even if the consignment note were a record for the purposes of s. 1 (1) (a) of the Act of 1965, it was not a record relating to any trade or business, as the Home Office supply and transport branch did not carry on a "business" within the meaning of the section; the prosecution had, therefore, failed to prove approval by the Secretary and the conviction must be quashed. (*R. v. Gwilliam*. C.A. (Cr. Div.)) 44
5. Driving with blood-alcohol proportion above prescribed limit; breath test; approval by the Secretary of State of device and equipment; proof; written statement by assistant secretary in Home Office; Criminal Justice Act, 1967, s. 2 (1) (7).—On the issue whether a device used for a breath test was equipment approved by the Secretary of State under s. 7 (1) of the Road Safety Act, 1967:—*Held*: a written statement made by an assistant secretary in the police department of the Home Office which had been tendered at the committal proceedings and read out in court at the trial under the provisions of the Criminal Justice Act 1967, s. 2 (1) and (7), was properly admitted in evidence. (*R. v. Holt*. C.A. (Cr. Div.)) 49

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6. Driving with blood-alcohol proportion above prescribed limit; breath test; arrest; impairment reasonably expected; duty of arresting officer; Road Traffic Act, 1960, s. 6 (4); Road Safety Act, 1967, s. 2 (1).—Where a breath test has been demanded and an arrest follows, and the arresting officer reasonably suspects the arrested person not only of an offence under the Road Safety Act, 1967, but also of impairment of driving ability, the proper course is for him on arrest to make it clear to the arrested person that he is being arrested not only as the result of a breath test under s. 2 of the Act of 1967, but also under s. 6 (4) of the Road Traffic Act, 1960. (*R. v. Wall. C.A. (Cr. Div.)*) . . . 310

7. Driving with blood-alcohol proportion above prescribed limit; breath test; device; instructions for use of device; compliance with instructions essential; Road Safety Act, 1967, s. 7 (1).—By s. 7 (1) of the Road Safety Act, 1967: “. . . ‘breath test’ means a test for the purpose of obtaining an indication of the proportion of alcohol in a person’s blood carried out by means of a device approved for the purpose by the Secretary of State, on a specimen of breath provided by that person.” To comply with this definition the test must be carried out not only by means of an approved device, but also in accordance with the relevant instructions appearing on the device, including that which requires 20 mins. to elapse between the last drink and the taking of the test. Unless these instructions have been observed, the test is not a valid test for the purposes of s. 7 (1), and no valid arrest on a charge of driving with blood-alcohol proportion above the prescribed limit can be made. *Per Curiam*: There is no duty, as such, on a police officer to make inquiries when a potential defendant had his last drink. Each case depends on its circumstances. (*Webber v. Carey. Q.B.D.*) . . . 633

8. Driving with blood-alcohol proportion above prescribed limit; breath test; device; proof of identity; evidence of police constable; Road Safety Act, 1967, s. 7 (1).—The defendant was arrested by a police constable on suspicion of having committed a traffic offence while a vehicle was in motion. He was taken to a police station after a breath test which proved positive. There he was given the opportunity of providing a further specimen of breath, but failed to do so, and he also failed to provide a specimen of blood or urine for a laboratory test. He finally picked up the device used for the breath test, threw it against a wall, and completely shattered it. He was charged with contravention of s. 3 (3) of the Road Safety Act, 1967. A police officer giving evidence for the prosecution at the magistrates’ court, said that the device was an “Alcotest 80.” When asked in cross-examination how he knew this, he said: “Because it said so on the box.” The box was not produced in evidence. It was not the practice of the police in any circumstances to produce the device because it contained corrosive substances. The justices dismissed the information on the ground that evidence was essential to establish that the device used was an “Alcotest 80,” and that the evidence of the police officer was inadmissible for this purpose. On appeal by the prosecutor:—*Held*: (i) the device being a chattel, physical production of it was not necessary, but proof of its identity was required; (ii) evidence of a police officer identifying the device from his own knowledge and experience was admissible; and the case must be remitted to the justices. (*Miller v. Howe. Q.B.D.*) . . . 665

9. Driving with blood-alcohol proportion above prescribed limit; breath test; device to be approved by Secretary of State; production of order signifying approval; “order”; Breath Test Device Approval (No. 1) Order, 1968; Documentary Evidence Act, 1868 s. 2, as amended by the Documentary Evidence Act, 1882, s. 2.—On a charge of driving

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a motor vehicle with a blood-alcohol proportion exceeding the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, in order to prove that the Secretary of State had approved the type of device used for a breath test as required by s. 7 (1) of the Act, the prosecution produced a print of a document entitled the Breath Test Device (Approval) (No. 1) Order, 1968, showing that it had been printed and published by the Stationery Office on February 9, 1968, and purporting to be signed by the Home Secretary in pursuance of his powers under s. 7 (1):—*Held*: the document was an "order" within the meaning of s. 2 of the Documentary Evidence Act, 1868 (as amended), as the word "order" should be given a wide meaning covering, at any rate, any executive act of government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament; accordingly the approval of the device by the Home Secretary had been proved. (*R. v. Clarke*. C.A. (Cr. Div.)) 282

10. Driving with blood-alcohol proportion above prescribed limit; breath test; meaning of "requirement" to take test; refusal to supply specimen; what amounts to refusal; reasonable excuse; burden of proof; Road Safety Act, 1967, s. 2 (1), s. 3 (3), (6).—Any request to the driver of a motor-vehicle which, it is clear to the driver, is being made as of right is sufficient to amount to a "requirement" to take a breath test under s. 2 (1) of the Road Safety Act, 1967. Any words or any actions on the part of a driver which make it clear to the jury that in all the circumstances of the particular case he was declining a police officer's proper invitation to provide a specimen for a laboratory test under s. 3, (3) or (6) of the Act amount to a refusal to provide such a specimen. If a reasonable excuse emerges which excuses the defendant from providing a specimen for a laboratory test, that is a defence to a charge under s. 3 (3). Where evidence of a reasonable excuse has emerged, the burden is on the prosecution to eliminate the defence of reasonable excuse. (*R. v. Clarke*. C.A. (Cr. Div.)) 546

11. Driving with blood-alcohol proportion above prescribed limit; "person driving"; breath test; test to be taken as soon as reasonably practicable after commission of offence; vehicle stationary at time of test; continuing offence; failure to carry rear red lights; Road Safety Act, 1967 s. 2 (1).—The phrase "any person driving" a motor vehicle in s. 2 (1) of the Road Safety Act, 1967, includes not only the driver occupying the driving seat both when the vehicle is in motion and when it is stationary, but also a person who has temporarily left the driving seat, but in general terms, can be described as the driver. The offence of failing to carry on the rear of a vehicle at night two red lamps is a continuing offence. Where, therefore, a vehicle had been driven at night for half a mile with a defective rear light and followed by a police constable, who approached the driver after the latter had made a temporary stop and got out of the vehicle and required him to take a breath test:—*Held*: an offence was being committed at the time when the constable spoke to the driver and that the requirement to take a breath test was made "as soon as reasonably practicable" after the commission of the offence. (*R. v. Price*. C.A. (Cr. Div.)) 47

12. Driving with blood-alcohol proportion above prescribed limit; breath test; person driving or attempting to drive a motor vehicle; driver temporarily stopping and leaving car; suspicion arising after actual driving of vehicle has ceased; Road Safety Act, 1967, s. 2 (1).—By s. 2 (1) of the Road Safety Act, 1967: "A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath

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- test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body . . .” This subsection covers a period of time when a vehicle has ceased to be in motion on a road. Where a person who has been driving a car has temporarily stopped the car and got out of it is a question of fact and degree in each case how long thereafter he can be said to be “driving or attempting to drive” the car within the subsection: *Per* the House of Lords, LORD GUEST, dissenting. *Per* LORD MORRIS OF BORTH-Y-GEST: The suspicion mentioned in s. 2 (1) (a) need not arise during a period in which the car is actually being driven. It is sufficient if it arises after the driver has stopped the car and left it. (*Pinner v. Everett*. H.L.) 653
13. Driving with blood-alcohol proportion above prescribed limit; charge of failure to provide specimen for laboratory test; evidence whether defendant received mandatory warning contradictory; issue to be left to jury; direction to jury; Road Safety Act, 1967, s. 3 (3), (10).—On a prosecution for failing to provide a specimen of blood or urine for a laboratory test without reasonable excuse, contrary to s. 3 (3) of the Road Traffic Act, 1967, where the defendant disputes the evidence of the prosecution that he received the warning under s. 3 (10) regarding the consequences of failing to comply with a request for a specimen, this issue should be left to the jury since they might regard it as highly relevant on the question whether the defendant had a reasonable excuse for refusing to supply a specimen, and the jury should be directed that, if they are not satisfied beyond a reasonable doubt that the defendant was so warned, they ought to take that into account when considering the issue of reasonable excuse. (*R. v. Dolan*. C.A. (Cr. Div.)) 696
14. Driving with blood-alcohol proportion above prescribed limit; disqualification; discretion not to order; special reason; amount of excess only slight; Road Traffic Act, 1962, s. 5 (1); Road Safety Act, 1967, s. 1 (1), s. 5 (2) (a).—On a conviction of driving a motor vehicle with a blood-alcohol proportion above the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, the fact that the amount of excess above the prescribed limit is only slight cannot constitute a special reason for not disqualifying the offender in accordance with s. 5 (2) (a) of the Act of 1967 and s. 5 (1) of the Road Traffic Act, 1962. (*Delaroy-Hall v. Tadman*; *Earl v. Lloyd*; *Watson v. Last*. Q.B.D.) 127
15. Driving with blood-alcohol proportion above prescribed limit; disqualification; special reasons; driving ability not impaired; accident not fault of defendant; Road Safety Act, 1967, s. 1 (1).—On a conviction of driving with a blood-alcohol proportion exceeding the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, neither the fact that the driving ability of the defendant was not impaired nor the fact that his driving was not the cause of an accident can amount to a special reason for not ordering disqualification for holding a driving licence. (*Taylor v. Austin*. Q.B.D.) 182
16. Driving with blood-alcohol proportion above prescribed limit; disqualification; special reasons; impairment of ability to drive through combination of drink and drugs; no knowledge of effect of drug; Road Traffic Act, 1962, s. 5 (1); Road Safety Act, 1967, s. 7 (1).—The appellant pleaded guilty to driving a motor vehicle having consumed alcohol in such a quantity that the proportion thereof in her blood exceeded the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967. She was fined and disqualified for holding a driving licence for 12 months. On appeal against the order of disqualification, she contended that there were special reasons within the meaning of s. 5 (1) of the Road Traffic Act, 1962, as applied by s. 5 (2) (a) of the Act of 1967, why the

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| mandatory period of disqualification should not be imposed, namely, that she had been taking, under medical treatment over a period of years, two kinds of tablets, anti-depressant tablets and sleeping tablets, and that, while she knew that it was dangerous to drink after taking the anti-depressant tablets, she had no idea that a combination of sleeping tablets and drink would produce a more violent reaction in terms of her ability to drive than if she had taken the drink alone:— <i>Held</i> : the aforementioned circumstances could not amount to special reasons in the case of an offence under s. 1 (1) of the Act of 1967. (R. v. Scott. C.A. (Cr. Div.)) | 369 |
| 17. Driving with blood-alcohol proportion above prescribed limit; disqualification; special reasons; driving ability not impaired; defendant a cripple dependent on invalid carriage; unusual condition of liver unknown to defendant; reasons peculiar to offender and not to offence; Road Traffic Act, 1962, s. 5 (1); Road Safety Act, 1967, s. 1 (1), s. 3 (3) (a), s. 5 (2) (a).—On conviction of an offence under s. 1 (1) or s. 3 (3) (a) of the Road Safety Act, 1967, none of the following facts can amount to a special reason for not imposing mandatory disqualification under s. 5 (1) of the Road Traffic Act, 1962, as applied by s. 5 (2) (a) of the Road Safety Act, 1967—(i) the fact that the driving ability of the defendant was not impaired by drink; (ii) the fact that the defendant is a cripple dependent on an invalid carriage and under the necessity of securing other transport if this is not available to him; (iii) the fact that the defendant suffers from an idiosyncratic state of the liver which was unknown to him, but which had the effect, when combined with his blood pressure, of causing the retention of alcohol in the blood to be longer than usual to some unspecified extent and degree. (R. v. Jackson. R. v. Hart. C.A. (Cr. Div.)) | 358 |
| 18. Driving with blood-alcohol proportion above prescribed limit; failing to provide specimen of blood or urine for laboratory test; prior opportunity to provide sample of breath; breathalyser; proof that test device complied with statutory requirements; Road Safety Act, 1967, s. 3 (3), s. 7 (1).—On a charge of failing to provide a specimen of blood or urine for a laboratory test, contrary to s. 3 (3) of the Road Safety Act, 1967, the prosecution must prove that the defendant had previously been given an opportunity to provide a sample of breath and that the apparatus used for this purpose complied with the requirements of s. 7 (1) of the Act. (R. v. Withecombe. C.A. (Cr. Div.)) | 123 |
| 19. Driving with blood-alcohol proportion above prescribed limit; provision of specimen; breath test; provision of specimen of breath "there or nearby"; matter of degree and fact; Road Safety Act, 1967, s. 2 (1).—Whether or not the place where the requirement to take a breath test under s. 2 (1) of the Road Safety Act, 1967, is "there or nearby" [to the place where the driving or attempting to drive has taken place] and whether the requirement was made as soon as reasonably practicable after the commission of the traffic offence are matters of degree and of fact for the justices who try the case. (Arnold v. Chief Constable of Kingston-upon-Hull. Q.B.D.) | 694 |
| 20. Driving with blood-alcohol proportion above prescribed limit; provision of specimen; breath test; provision of specimen of breath "there or nearby"; matter of degree and fact; Road Safety Act, 1967, s. 2 (1).—By s. 2 (1) of the Road Safety Act, 1967: "A constable in uniform may require any person driving . . . a motor vehicle on a road . . . to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body . . ." Whether or not the place where the requirement to | |

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- take a breath test under s. 2 (1) of the Road Safety Act, 1967, is "there or nearby" [to the place where the driving or attempting to drive has taken place] is a matter of degree and of fact for the justices who try the case. The word "nearby" is used in a purely geographical sense and was intended to cover a case where it was necessary to administer the test on a lay-by rather than on a main road, or similar circumstances. (*Donegani v. Ward*. Q.B.D.) 693
21. Driving with blood-alcohol proportion above prescribed limit; requirement to take breath test; "person driving or attempting to drive"; car parked and locked; driver about to enter house and hand over key; necessity for valid arrest prior to breath test; Road Safety Act, 1967, s. 2 (1).—The defendant, who had been driving a motor car, parked the car outside his father-in-law's house, took out the ignition key, and locked the car. He was about to enter the house and hand over the key to his father-in-law when he was stopped by police officers who had followed the car. When asked to blow up the bag of a breathalyser, he failed to do so, but voluntarily accompanied the police officers to a police station, though he had not been formally arrested. At the police station he took two breath tests and a blood sample was subsequently taken. Justices dismissed an information charging him with driving with a blood-alcohol proportion above the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967. On appeal by the prosecutor:—*Held*: the appeal should be dismissed on the grounds (i) that a person who was no longer driving or intending to drive a vehicle could not be held to be "driving or attempting to drive" within the meaning of s. 2 (1) of the Act of 1967 so as to be under an obligation to take a breath test; (ii) there had been no valid arrest, which under s. 3 (1) of the Act was a necessary preliminary to a breath test. *Per LORD PARKER, C.J.*: If the defendant had been arrested under s. 6 (4) of the Road Traffic Act, 1960, a specimen could properly have been demanded, and would have been admissible in evidence on the charge before the court. (*Campbell v. Tormey*. Q.B.D.) 267
22. Driving with blood-alcohol proportion above prescribed limit; specimen of blood; breath test; hospital patient; no objection by medical practitioner; proof; need to call medical practitioner; Road Safety Act, 1967, s. 2 (2), s. 3 (2) (a), (b).—Where a specimen of breath has been taken, under s. 3 (2) of the Road Safety Act, 1967, from a hospital patient, it is perfectly proper for the prosecution on a charge of driving with a blood-alcohol proportion above the prescribed limit, to call a police officer to give evidence that the medical practitioner in whose care was the patient was notified of the proposal to take the specimen and did not object. Objection or non-objection is a fact, and it is unnecessary to call the medical practitioner to state that he did not object. (*R. v. Chapman*. C.A. (Cr. Div.)) 405
23. Driving with blood-alcohol proportion above prescribed limit; specimen of blood; division into parts; part to be capable of analysis; congealment before analysis; Road Traffic Act, 1962, s. 2 (4).—A specimen of blood provided by a defendant under s. 2 (4) of the Road Traffic Act, 1962, must be one which is capable of analysis. Accordingly, a specimen of blood which congeals before it can be analysed at the earliest possible moment is not a sufficient specimen. (*Earl v. Roy*. Q.B.D.) 427
24. Driving with blood-alcohol proportion above prescribed limit; specimen of blood; division into parts; sample given to defendant; capability of analysis; burden of proof; quality; analysis by use of ordinary equipment and ordinary skill; analysis possible only by use of expensive or highly sophisticated equipment; Road Traffic Act, 1962, s. 2 (4).—

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Where a defendant has supplied a specimen of blood under s. 3 (1) of the Road Safety Act, 1967, and that specimen has been divided into parts one of which has been given to the defendant, the burden of proving that that part is capable of analysis by the use of ordinary equipment and ordinary skill by a reasonable skilled analyst is on the prosecution. *Per Curiam*: If the part provided for the defendant is of such quality that analysis of it is possible only by using expensive or highly-sophisticated equipment available only to the favoured few, the analyst's certificate could not be admitted in evidence. (*R. v. Nixon. C.A. (Cr. Div.)*)

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25. Driving with blood alcohol proportion above prescribed limit; specimen of blood; failure to provide; "reasonable excuse"; arm selected as site by doctor; defendant's refusal to supply except from big toe; Road Safety Act, 1967, s. 3 (3).—By s. 3 (3) of the Road Safety Act, 1967, a person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under s. 3 is guilty of an offence. In relation to a specimen of blood, the word "requirement" in s. 3 (3) relates to a requirement by a doctor exercising his medical skill and experience as to the site from which blood is to be abstracted. Where, therefore, a doctor had requested the respondent to provide a specimen of blood from his arm and the respondent refused to provide a specimen otherwise than from his big toe.—*Held*: this was an unreasonable refusal by the respondent and the respondent was guilty of an offence against s. 3 (3). (*Solesbury v. Pugh. Q.B.D.*) . . .

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26. Driving with blood-alcohol proportion above prescribed limit; specimen of blood; validity of arrest; breath test; failure to give specimen of breath; defective equipment; Road Safety Act, 1967, s. 1 (1), s. 2 (1), (5).—By s. 2 (5) of the Road Safety Act, 1967: "If a person required by a constable under subs. (1) or (2) of this section to provide a specimen for a breath test fails to do so . . . the constable may arrest him without warrant . . ." Where defective equipment for a breath test has been provided, inability to provide a specimen of breath for that reason is not a failure to do so within the meaning of the aforementioned subsection. Failure denotes that the defendant has failed to do something which was possible. (*Hoyle v. Walsh. Q.B.D.*)

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27. Goods vehicle; driver; period of rest; work on voluntary basis; overtime work in employers' scrap yard cutting metal; work within general contract between driver and employers; Road Traffic Act, 1960, s. 73 (1) (iii).—The first defendant was the driver of a goods vehicle owned by the second defendants, his employers. There was an agreement between the second defendants and their employees that any employee, after his normal day's work and if he so desired, could work in the employers' scrapyard cutting up scrap and thereby earn overtime. The first defendant, of his own free will and without any specific request from the second defendants, but with their implied consent, after driving his vehicle for 12 hours in one day, worked a further $3\frac{1}{2}$ hours cutting up scrap metal. This meant that in a period of 24 hours he had less than 10 hours for rest, as prescribed by s. 73 (1) (iii) of the Road Traffic Act, 1960. Informations were preferred against the first defendant for driving a goods vehicle without having 10 consecutive hours of rest in a 24-hours period contrary to s. 73, and against the second defendants for permitting the driver to commit the offence. Justices dismissed the informations. On appeal by the prosecutor:—*Held*: as the overtime work was equally for the benefit of the driver and his employers and wholly within the terms of the general contract between them, the time spent on that work could not count as part of the rest period, and the

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- case must be remitted to the justices with a direction to convict in each case. (*Potter v. Gorbould and Another*. Q.B.D.) 717
28. Land implement; scraper used for civil engineering work; levelling and excavating land and removal of soil; "land implement" confined to vehicle used in general farming and forestry land work; Motor Vehicles (Construction and Use) Regulations, 1966, reg. 3.—The term "land implement" in reg. 3 of the Motor Vehicles (Construction and Use) Regulations, 1966, is confined to a vehicle used in general farming and forestry land work, and does not include a vehicle used for civil engineering work on building sites. The respondent was charged with offences against s. 64 (2) of the Road Traffic Act, 1960 (as amended), arising out of his use on a road of a motor tractor drawing a four-wheeled trailer. The allegations were that the trailer contravened six different regulations of the Motor Vehicles (Construction and Use) Regulations, 1966. The trailer was a scraper primarily used for civil engineering work for levelling and excavating land and moving soil. A representative of the area distributor of these machines gave evidence that, during his 22 years' experience, he could not recollect a single case of such a machine being sold or used for agricultural purposes. At the close of the case for the prosecution a submission was made by the defence that the scraper was exempt from compliance with the regulations, in that it was a "land implement" within the meaning of reg. 3. The justices upheld the submission and dismissed the informations. On appeal by the prosecutor:—*Held*: the scraper was not a "land implement" within the meaning of reg. 3, and the case must be remitted to the justices to continue the hearing. (*Markham v. Stacey*. Q.B.D.) 63
29. Overtaking vehicles; collision in middle lane; burden of proof; inconclusive evidence.—Where a collision occurs between two overtaking vehicles travelling in opposite directions in a centre lane for which both have been competing, the plaintiff is not required to prove that the defendant was negligent. It is sufficient if he establishes a *prima facie* case that one or other or both of the drivers were negligent. If on the evidence the Judge cannot say which of the drivers was to blame, he should find that both are to blame and equally to blame. (*Davison v. Leggett*. C.A.) 552
30. Parking; restriction on waiting; unloading; machine placed on pavement of busy road; vehicle moved 50 yds. to quieter road in "No through road"; return of driver to complete delivery; County of Dorset (Various Roads, Swanage) (Prohibition and Restriction on Waiting) Order, 1967.—The respondent drove a van to the entrance of a golf course where he was delivering a mowing machine. The golf course was in a restricted road, where a vehicle might wait only so long as was necessary to enable goods to be unloaded from it. As the road carried a heavy volume of traffic, the respondent decided to place the machine on the pavement and drive the van some 50 yards forward into a "No through road" (also a restricted road), park it there, and then return to deliver the machine. An information was preferred against him charging him with causing a motor vehicle to wait in a prohibited area, contrary to the County of Dorset (Various Roads, Swanage) (Prohibition and Restriction on Waiting) Order, 1967, but was dismissed by the justices. On appeal by the prosecutor:—*Held*: although in the ordinary course of events the process of unloading could embrace the full time occupied in delivering goods from a van to the premises to which they were going, the position was different where the van had been removed from the place of unloading to another street; in such circumstances the

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| unloading could not be said to be continued in that other street; and, therefore, the case must be remitted to the justices with a direction to convict, though, no doubt, they would regard the offence as purely technical. (<i>Pratt v. Hayward</i> . Q.B.D.) | 519 |
| 31. Sentence; long periods of disqualification; desirability of applications for restoration of licences in case of a number of disqualifications imposed by different courts being dealt with by one court.—Observations on the undesirability of long periods of disqualification for road traffic offences and on the desirability of legislation being introduced to enable applications for restoration of licences, when a number of periods of disqualification have been imposed by different courts, to be dealt with by one court. (<i>R. v. Shirley</i> . C.A. (Cr. Div.)) | 691 |
| 32. Traffic offence; request for information as to driver of vehicle; duty to give information; request signed by police sergeant; no evidence of delegation of authority from chief officer of police; Road Traffic Act, 1960, s. 232 (2) (a) (i).—By s. 232 (2) of the Road Traffic Act, 1960: "Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies—(a) the owner of the vehicle shall give such information as to the identity of the driver as he may be required to give—(i) by or on behalf of a chief officer of police . . ." A vehicle, of which the appellants were the owners, was alleged to have been concerned in an offence to which s. 232 of the Road Traffic Act, 1960, applied, and a request for information from the appellants as to the identity of the driver under s. 232 (2) (a) (i) of the Act was made on a form signed by a police sergeant. The appellants contended that they were not obliged to supply the information on the ground that the sergeant had no delegated authority from the Commissioner of Police from the Metropolis to sign the form. The appellants were convicted under s. 232 (2) (a) (i) of the Act for failing to give the information sought. On appeal:— <i>Held</i> : there was no evidence that the sergeant had the necessary delegated authority from the Commissioner to enable him to sign forms of this kind, and accordingly the request had not been made "by or on behalf of a chief officer of police". The conviction must, therefore, be quashed. (<i>Record Tower Cranes, Ltd. v. Gisbey</i> . Q.B.D.) | 167 |
| 33. Vehicle owner; charge of failing to give information as to identity of driver at time of offence; burden of proof; first issue to be decided whether vehicle involved was owner's vehicle; Road Traffic Act, 1960, s. 232 (3).—Where a charge under s. 232 (3) of the Road Traffic Act, 1960, is brought against the owner of a vehicle, alleging that he has failed to give information as to the identity of the driver of the vehicle at the time of an alleged offence, and the owner disputes the fact that the vehicle was driven at the time and place alleged, justices must first decide the question whether they are satisfied, on the ordinary standard of proof applicable to a criminal case, that the vehicle involved was the owner's vehicle. If they are not so satisfied, the information should be dismissed, but, if they are so satisfied, they must next consider whether the owner has established, on the more limited standard of proof laid upon the defendant, that he did not know and could not with reasonable diligence have ascertained who the driver was. (<i>Neal v. Fior</i> . Q.B.D.) | 78 |

S

SALMON AND FRESHWATER FISHERIES

Salmon or migratory trout; fixed net; tidal waters; personal knowledge of justices.—The appellant was convicted of an offence against s. 11 (1) of the Salmon and Freshwater Fisheries Act, 1923, the allegation being that

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he had placed a fixed engine (a net) in tidal waters for taking salmon or migratory trout. The net was secured and left unattended in the sea about one hundred yards from the shore. In deciding to convict, the justices made use of their personal knowledge and said in the case stated: "We considered that tidal waters consist of waters affected by a lateral or horizontal flow of water . . . and it is within our knowledge that such a flow extended beyond low water mark and is experienced at more than one hundred yards from the shore." On appeal:—*Held*: although the definition of tidal waters in the Salmon Fishery Act, 1861, which embraced the sea, had not been reproduced in the consolidating and amending Act of 1923, it did not follow therefrom that tidal waters did not now include the sea; tidal waters might include at any rate territorial waters in which there was a perceptible ebb and flow of the tide; and the justices were entitled to use their personal knowledge of the locality in reaching their decision. The appeal must, therefore, be dismissed. *Quaere*: whether waters may be tidal waters where the movement is vertical rather than lateral, as when water passes between cliffs. (*Ingram v. Percival*. Q.B.D.) 1

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TOWN AND COUNTRY PLANNING

1. Development; "engineering operation"; demolition; blast walls and embankments protecting magazines and explosives stores; Town and Country Planning Act, 1962, s. 12 (1).—The appellants acquired six buildings, four of which had been used during the war of 1939-45 as magazines and two as stores for explosives. Around each of them blast walls, about nine ft. in height, had been erected, and against these walls there were substantial sloping embankments consisting of rubble and soil. In 1966 the appellants employed contractors to remove the walls and embankments as they would be unnecessary and inconvenient when the buildings were used for civilian purposes. The appellants had not obtained planning permission for this work, and the local planning authority served on them an enforcement notice, requiring them to discontinue their operations and restore the property to its prior condition. The respondent Minister dismissed an appeal by the appellants against the notice, holding that the walls and embankments were an integral part of each of the buildings and that their removal was an "engineering operation" within s. 12 (1) of the Town and Country Planning Act, 1962, and a material alteration of the buildings, and so was "development" within the meaning of the Act:—*Held*: the decision of the Minister involved no error of law. Decision of the Court of Appeal (1967) 132 J.P. 203, affirmed. (*Coleshill and District Investment Co., Ltd. v. Minister of Housing and Local Government and Another*. H.L.) 385
2. Development; material change of use; discontinuance of original use; abandonment; resumption of original use; petrol filling station with land attached; use for dual purpose of filling station and for sale and display of cars; discontinuance of use for sale and display of cars; subsequent resumption; Town and Country Planning Act, 1962, s. 12 (1).—A site consisted of a petrol filling station ("the red land") and an adjoining plot ("the blue land"), the permitted use of which was for agricultural or residential purposes. There was no defined access from the highway to the site. The red land was originally used for the dual purpose of a petrol filling station and for the display and sale of cars. The blue land had been used, at any rate until 1959, for the display of cars for sale. In March, 1961, F purchased the red land and later in the same year the blue land. He died in 1963, and afterwards his widow

TOWN AND COUNTRY PLANNING—*continued*

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and son carried on the business of the petrol filling station, but allowed the display and sale of cars to lapse. In February, 1965, the appellant purchased the whole site from Mrs. F and thereafter conducted on the red land the business of selling cars as well as the petrol filling station. On March 1, 1967 (within four years of the change of title) an enforcement notice was served by the local planning authority on the appellant, alleging that no planning permission for the use of the land by him for the display and sale of cars had been obtained and requiring immediate discontinuance. The appellant appealed against the notice to the Minister, who found that by 1965 the use of the land for car sales had been abandoned and that the re-introduction of the use of the site for the display and sale of cars in 1965 involved a material change of use amounting to development under s. 12 (1) of the Town and Country Planning Act, 1962. He accordingly dismissed the appeals and from that decision the appellant appealed to the Divisional Court:—*Held*: that the appeal must be dismissed as the question whether there had been a change of use was largely a question of fact and degree and so pre-eminently a question for the Minister and there was no error in law in the Minister's approach to the issue. *Per* ASHWORTH, J.: If the sole use to which land is put is suspended and thereafter resumed without there having been an intervening different user, *prima facie* the resumption does not constitute development, although there may be cases in which the period of suspension is so long that its original use can properly be described as having been abandoned. If land is put to more than one use, the cessation of one of the uses does not of itself constitute development. (*Hartley v. Minister of Housing and Local Government and Another. Q.B.D.*) 147

3. Development; permission; permission granted in 1945; subsequent application for development of part of area refused; compensation accepted for loss of development value; inconsistency with 1945 permission.—In 1945 the owner of a large industrial estate of some 500 acres in extent submitted to the local authority an application for planning permission in respect of 240 acres, then undeveloped shown coloured on a plan. By mistake permission was granted for development of an area shown uncoloured on the plan. No action was taken by the owner on this permission, and between 1945 and 1955 new separate applications were made for permission to erect factories on 150 acres of the 240 acres. In 1955 the owner applied for permission to erect industrial buildings on the remaining 90 acres which was refused. In consequence he recovered £178,545 compensation under s. 59 of the Town and Country Planning Act, 1954. The owner now claimed to be entitled to proceed under the 1945 permission which he contended was still in force:—*Held*: in the light of the plan, with which the 1945 permission must be construed, that permission must be taken to apply to the 240 acres, and it was still valid in 1955, but by claiming compensation in 1955 the owner had elected to exercise a right inconsistent with the continued validity of that permission, and so had abandoned any right which they had under it. (*Slough Estates, Ltd. v. Slough Borough Council and Another. C.A.*) 479

4. Negligence; breach of statutory duty; compensation notice; negligent search; false certificate issued by council employee; liability of registrar of local land charges register and local authority; Town and Country Planning Act, 1954, s. 28 (5); Land Charges Act, 1925, s. 17 (3); Local Land Charges Rules, 1934, r. 15; Local Land Charges (Amendment) Rules, 1954, r. 2.—In 1960 N was refused permission to develop certain land and was paid compensation in accordance with the Town and Country Planning Acts. The Ministry of Housing and Local

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Government served a compensation notice relating thereto which was duly registered in the local land charges register kept by the rural district council. Two years later N was granted permission to develop the land, and in accordance with the Acts the compensation had to be repaid to the Minister before the development could take place. Purchasers of the land sent a requisition to the council for an official search in the register. An employee of the council carried out the search negligently and failed to record the compensation notice. The purchasers completed the purchase without knowledge of the notice. The Minister initially sought to recover the amount of the compensation from the purchasers, but subsequently he conceded that they were not liable to repay it. He made this concession because of s. 17 (3) of the Land Charges Act, 1925, which provided that a certificate issued by a registrar was to be conclusive "in favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries [were] registered or allowed [by the Land Charges Act to be made in the register]". Section 28 (5) of the Town and Country Planning Act, 1954, provided for rules to be made under s. 15 (6) of the Land Charges Act, 1925, as to the manner in which compensation notices were to be registered in the register of local land charges. In purported pursuance of this power the Local Land Charges (Amendment) Rules, 1954, provide that r. 15 (1) of the Local Land Charges Rules, 1934, was to apply to compensation notices under the Act of 1954. That rule applied s. 17 (3) of the Land Charges Act, 1925. The Minister claimed the amount of the compensation on the ground of breach of statutory duty from the first defendant who was the clerk of the council and as registrar was under a duty to keep the register, and also from the council who were second defendants on the grounds of negligence and breach of statutory duty:—*Held*: (i) s. 17 (2) of the Land Charges Act, 1925, imposed on the registrar a duty to include in the certificate all entries which actually subsisted on the register, and since this was not done he was in breach of that statutory duty; (ii) the employee who searched the register was under a duty of care towards the Minister and he was in breach of it by giving a clear certificate omitting the compensation notice and the second defendants were vicariously liable for his negligence; (iii) the action, however, failed as the Minister had wrongly assumed that the certificate was conclusive whereas it was not since the rules of 1954 were (a) *ultra vires* insofar as they purported to apply to compensation notices the provision of r. 15 of the Local Land Charges Rules, 1934, which incorporated s. 17 (3) of the Land Charges Act, 1925, or (b) ineffective to do since r. 15 was itself ineffective to make certificates conclusive in respect of anything except "matters or documents whereof entries [were] required or allowed "to be made in the registry by the Land Charges Act, 1925, and entries of compensation notices were not required or allowed by that Act. (Ministry of Housing and Local Government v. Sharp and Another. Q.B.D.) . .

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5. Permission; conditional grant; permission to have effect at end of specified period unless within that time approval of particulars relating to proposed building signified to applicant; Town and Country Planning Act, 1947, s. 14 (1) (2).—By s. 14 of the Town and Country Planning Act, 1947 [see now ss. 17 and 18 of the Town and Country Planning Act, 1962]: "(1) . . . where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit . . . (2) Without prejudice to the generality of the foregoing subsection conditions may be imposed on the grant of permission to develop land thereunder—(a) for regulating the development or use of

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land under the control of the applicant . . . or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connexion with the development authorized by the permission; (b) for requiring the removal of any buildings or works authorized by the permission, or the discontinuance of any use of land so authorized, at the expiration of a specified period, and the carrying out of any works required for the reinstatement of land at the expiration of that period . . .” A local planning authority granted outline planning permission to the plaintiffs subject to the conditions: (i) “The subsequent submission and approval of details relating to (a) siting, height, design, and/or external appearance of the building, (b) means of access. (ii) The permission ceasing to have effect after the expiration of three years from the date of issue unless within that time approval has been signified to those matters reserved under condition (i) above”:—*Held*: per DAVIES, L.J.: a condition requiring the submission of details of the proposed development within a prescribed time might be a valid condition, but under condition (ii) the planning permission might lapse without any default on the part of the plaintiffs and so that condition was unreasonable and bad; per WINN, L.J., a planning authority was not empowered by s. 14 (1) to impose any time limit on the validity of a planning permission except for the purposes specified in s. 14 (2), and so the condition sought to be impugned was repugnant to the Act and to the permission to which it was attached; but the invalid condition was severable from the rest of the permission (per DAVIES, L.J.) as (though it might have been administratively convenient to the planning authority) it did not relate and was unimportant to the actual development, and (per WINN, L.J.) the condition, being void and of no effect, could have no force in relation to the permission itself; therefore, the outline permission, validly granted, still subsisted. (*Kingsway Investments (Kent), Ltd. and Another v. Kent County Council*. C.A. (Civ. Div.))

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WEIGHTS AND MEASURES

1. Prepacked goods; “prepacked”; made up in advance in form appropriate for retail sale; *Weights & Measures Act, 1963, s. 58 (1)*.—By the *Weights and Measures Act, 1963, s. 58 (1)* “pre-packed” is defined in relation to goods offered for sale as “made up in advance ready for retail sale in or on a container”. Those words mean “made up in advance in a form appropriate for retail sale should the goods be sold by retail”. (*Nattrass v. Brereton*. Q.B.D.)
2. Sale by measurement; railway refreshment room; short measure of whisky sold by barmaid; licensee not present; no knowledge on part of licensee; instructions by licensee to the managers of refreshment rooms; liability of licensee for causing short measure to be delivered; *Weights and Measures Act, 1963, s. 24 (1)*.—The defendant, who was the secretary of *British Transport Hotels, Ltd.*, was the licensee of a refreshment room at W railway station. He had delegated his authority and his duty to supervise establishments of this kind, first to his general manager, then to his district manager, and finally to the manageress of the refreshment room. He had drafted instructions to managers and manageresses at refreshment rooms owned by *British Transport Hotels, Ltd.*, which were sent by the general manager to all managers and manageresses. The object of the instructions was to ensure compliance with the law. The defendant had never been to the refreshment room at W railway station and had never met the manageress. The manageress sold

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to a customer a short measure of whisky. The defendant was convicted at a magistrates' court of causing to be delivered whisky short of the full measure purported to be sold, contrary to s. 24 (1) of the Weights and Measures Act, 1963, but the conviction was quashed on appeal by the defendant to quarter sessions. On appeal by the prosecutor by Case Stated to the Divisional Court:—*Held*: that the case must be remitted to quarter sessions with a direction that the conviction be restored, since only the defendant, the licensee, could sell, and, being absent from the premises, he sold through his servant, the manageress, and by every sale he conducted through her he thereby caused to be delivered that which was sold. (*Sopp v. Long*. Q.B.D.). 261

JUSTICE OF THE PEACE REPORTS

VOLUME 133

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., WALLER AND FISHER, JJ.)

May 21, 22, 1968

INGRAM *v.* PERCIVAL

Fisheries—Salmon or migratory trout—Fixed net—Tidal waters—Personal knowledge of justices.

The appellant was convicted of an offence against s. 11 (1) of the Salmon and Freshwater Fisheries Act, 1923, the allegation being that he had placed a fixed engine (a net) in tidal waters for taking salmon or migratory trout. The net was secured and left unattended in the sea about one hundred yards from the shore. In deciding to convict the justices made use of their personal knowledge and said in the Case Stated: "We considered that tidal waters consist of waters affected by a lateral or horizontal flow of water . . . and it is within our knowledge that such a flow extended beyond low water mark and is experienced at more than one hundred yards from the shore." On appeal,

HELD: although the definition of tidal waters in the Salmon Fishery Act, 1861, which embraced the sea, had not been reproduced in the consolidating and amending Act of 1923, it did not follow therefrom that tidal waters did not now include the sea; tidal waters might include at any rate territorial waters in which there was a perceptible ebb and flow of the tide; and the justices were entitled to use their personal knowledge of the locality in reaching their decision. The appeal must, therefore, be dismissed.

QUAERE: whether waters may be tidal waters where the movement is vertical rather than lateral, as when water passes between cliffs.

CASE STATED by Sunderland justices.

On Aug. 8, 1967, an information was preferred by John Thompson Percival, the respondent, alleging that William Ingram, the appellant, had unlawfully used a fixed engine, namely, a net placed and secured by anchors or weights in tidal waters, near the North Pier at Sunderland and left unattended, for taking salmon or migratory trout, contrary to s. 11 of the Salmon and Freshwater Fisheries Act, 1923. The justices heard the case on Sept. 29 and Oct. 12 and 25, 1967, and found the following facts: (i) On July 11, 1967, the appellant used a net for taking salmon and migratory trout in water near the North Pier at Sunderland; (ii) the net was a fixed engine in that it was both secured by anchors and left unattended for taking salmon or trout; (iii) the net was fixed in the sea about one hundred yards from the shore. These facts were admitted by the appellant, and the only issue was whether the net was used in "tidal waters". There was no evidence before the justices that the net was either above or below the low water mark, but it was agreed by the parties that it was in the sea at the position marked on a map that was produced.

The appellant contended before the justices that the tidal waters should be defined as a river or sea within the limits of the ebb and flow of a normal tide,

considered laterally and not vertically. The respondent contended that they should be defined as waters affected by the ebb and flow of a normal tide, considered both laterally and vertically and not be limited to high and low water mark. The justices decided that "tidal waters" consisted of waters affected by a lateral or horizontal flow of water and that such a flow extended beyond low water mark and was experienced at more than one hundred yards from the shore. The appellant was convicted, and he appealed.

R. A. R. Stroyan for the appellant.

R. W. Bell for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county borough of Sunderland who convicted the appellant of an offence against s. 11 (1) of the Salmon and Freshwater Fisheries Act, 1923. That section makes it an offence to place a

"fixed engine of any description . . . for taking or facilitating the taking of salmon or migratory trout or for detaining, or obstructing the free passage of, salmon or migratory trout in any inland or tidal waters."

[His LORDSHIP referred to the facts as found by the justices and continued:] A map was produced at the hearing which, while it was not admitted to be accurate in all respects, showed by reference to a pencil mark where this net was in fact found. It is one hundred yards off the shore and north of the mouth of the River Wear. The mouth of the River Wear is bounded on the north by Roker pier and on the south by new South pier, and the place where the net was found was up the coast from Roker pier, some little distance away from the mouth of the river. All that is admitted, and the sole question here, is whether that place where the net was fixed was in tidal waters. The justices came to the conclusion that it was and convicted the appellant.

In this appeal, counsel for the appellant has pointed out that in the Salmon and Freshwater Fisheries Act, 1923, reference is sometimes made to "territorial waters", sometimes to "any waters", sometimes to "inland waters", sometimes to "tidal waters", and sometimes to "the sea". Accordingly, he relies on the finding here that this net was fixed in the sea. That, as it seems to me, however, is begging the question, because in that finding "the sea" is used as a perfectly general term, and the real point is whether "tidal waters" can embrace any part of the sea.

In this connexion counsel points out that the Salmon Fishery Act, 1861, dealing purely with salmon fisheries and not, as in the Act of 1923, also with freshwater fisheries, defines "tidal waters" in this way: "Tidal waters shall include the Sea, and all Rivers, Creeks, Streams, and other Water as far as the Tide flows and reflows". It is interesting to observe that that definition was necessary, and probably only necessary, for the purposes of s. 11 of the Act of 1861, and s. 11 of that Act was in similar, if not in exactly the same terms, as s. 11 of the Salmon and Freshwater Fisheries Act, 1923. Accordingly, counsel argues that Parliament, in passing the Act of 1923, which was not merely a consolidating Act but also an amending Act, deliberately threw over, as it were, the definition of "tidal waters" as including the sea. He says accordingly that that definition in the Act of 1861 has no relevance whatever to what is being considered here.

For my part I am unable to accept that argument. It is, of course, a matter to be considered that this definition has not been repeated in the Act of 1923; it may be that in referring to the sea in quite general terms, as the Act of 1861 did, Parliament in 1923 thought that that was going too far; but it does not follow from that that tidal waters should not include the sea, or at any rate

that part of the sea in which it can be said that the tide flows and reflows. Indeed, counsel was forced to admit in the course of his argument that tidal waters would include that part of the sea which lies between high water and low water mark and relied on the fact that the place where this net was found was below low water mark. For my part, I find it quite impossible to accept that contention if only because I can see no rhyme or reason for it. It seems to me to be a purely artificial distinction in that quite obviously tides do not ebb and flow solely in that area; the ebb and flow must continue below low water mark for a distance, at any rate.

It may be, though I find it quite unnecessary to consider the matter, that "tidal waters" extend to the open sea; it may be that scientifically it can be said that the tide ebbs and flows everywhere in the sea. But it seems to me that all that we are considering here is that part of the sea, and presumably that must be limited in connexion with these offences to territorial waters, in which there is at any rate a perceptible, a real, ebb and flow of the tide. The question therefore is whether the justices were entitled to find that at this position where the net was found, there was a perceptible, a real, ebb and flow of the tide, notwithstanding that it was fixed, as I understand it, below low water mark. In connexion with that, the justices say this:

"For the purpose of this case we considered that it was not necessary to determine whether tidal waters extend throughout the sea, as the respondent contended. It was sufficient to decide whether the net was in a position where the water was affected by a lateral ebb and flow. We considered that tidal waters consist of waters affected by a lateral or horizontal flow of water as distinct from a vertical rise and fall and it is within our knowledge that such a flow extends beyond low water mark and is experienced at more than one hundred yards from the shore. We therefore held that in this case the net was in tidal waters."

Accordingly, on the view I take of this case, the result depends on whether the justices were entitled to make use of the knowledge which they said that they had. In my judgment they were fully entitled to do so. It has always been recognised that justices may and should—after all, they are local justices—take into consideration matters which they know of their own knowledge, and particularly matters in regard to the locality, whether it be on land, as it seems to me, or in water. In my judgment, they were fully entitled to use that knowledge, and on that ground I would dismiss this appeal.

I would only add this, that in coming to that conclusion they have considered that tidal waters only include waters where there is a lateral ebb and flow; that was all that was necessary for them to consider in the present case, but I am far from saying that the consideration is limited to a lateral ebb and flow; it may well be, as when water passes between cliffs or high ground, that there will not be a lateral movement but a vertical movement.

Finally, I would say that each case must depend on the evidence as to the ebb and flow, and in cases where justices have not got a local knowledge of the particular case where a net is fixed, there must be evidence whether, at that place, there is in any real sense an ebb or flow, whether a lateral movement or a vertical movement.

WALLER, J.: I agree. Section 11 (1) appears in the part of the Salmon and Freshwater Fisheries Act, 1923, entitled: "Obstructions to passage of fish", and the section prohibits fixed engines to obstruct the free passage of salmon or migratory trout in any inland or tidal water.

It is easy to understand and follow what are meant by "inland waters" and it is in my view fairly easy to understand where the inland waters become tidal waters; if one is considering an estuary towards the mouth of the river, clearly the waters there are tidal waters. The difficult question, and the question which is raised in this case, is where those tidal waters end. Counsel for the appellant felt constrained to concede that there could be tidal waters, as LORD PARKER, C.J., has said, outside the mouth of a river. It seems to me that that was a concession which he had to make, because if it were not possible to prohibit the installation of fixed engines immediately beyond the mouth of a river up which salmon or migratory trout were seeking to go, it would be possible for the whole of the salmon and trout for that river to be prevented from going up without it being possible to take any action. It seems to me, therefore, that it is not possible to draw the line precisely at the mouth of the river.

Once it becomes impossible to draw the line there, one asks oneself: where is the line to be drawn? In my view, if a line is to be drawn at all, it is to be drawn beyond sea which flows and reflows; whether or not there is any such sea is a matter that it is not necessary to determine in this case, but if the tide is flowing and reflowing, that in my view is a tide in tidal waters. Again, I would say it matters not whether the movement, the ebb and flow, is a lateral or a vertical movement; that must simply be an accident of the particular place at which the observation is being made, and cannot affect the question, in my opinion, whether or not the waters are tidal.

I would only add this, that I also agree with the observation which fell from LORD PARKER, C.J., in relation to the justices using their local knowledge whether or not this particular water was tidal.

FISHER, J.: I agree with both judgments which have been delivered. For my part, I do not find it necessary to rely, in coming to my conclusion, on the definition contained in the Salmon Fishery Act, 1861. The conclusion which I have come to is derived from the language of the Salmon and Freshwater Fisheries Act, 1923, and from the ordinary use of words. I think I should refer to one section of that Act, since counsel for the appellant relied on it, that is s. 55 (2), in which, as he pointed out, both the expression "the sea" and the expression "tidal waters" are used. In my judgment, that section does not assist his argument, since "tidal waters" on any view include waters which are not part of the sea, and it is necessary therefore to have two separate expressions, and that section, where the section refers to the point to which tidal waters extend, is plainly referring to the upper limit of the tidal waters. Once counsel conceded, as I agree he had to, that there is an overlap between tidal waters and the sea, the question simply becomes one of how much of the sea is involved, and in that connexion I agree with what has fallen from my lords.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co., for Gordon & Slater, Sunderland; Lees & Co.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., MELFORD STEVENSON AND BRIDGE, JJ.)

July 30, 1968

R. v. ROBERTSON

Criminal Law—Trial—Fitness to plead—Issue raised by prosecution—Burden of proof—Standard of proof—Test of unfitness—Incapability of defendant to act in his own best interests.

Where the prosecution raise the issue of the defendant's fitness to plead the burden of proving that he is unfit to plead by reason of a disability under s. 4 of the Criminal Procedure (Insanity) Act, 1964, is on the prosecution, and the standard of proof is that ordinarily applicable on a criminal trial, namely, that of proving the matter beyond reasonable doubt.

The fact that a defendant is incapable of acting in his own best interests is not in itself sufficient ground to entitle the jury to return a finding of disability, and in directing a jury on the various tests referred to in *R. v. Pritchard*, (1836) 7 C. & P. 303 at p. 304, it is not right to preface the various tests by the addition of the word "proper", e.g., "give proper evidence at his trial".

APPLICATION by Eric John Robertson for leave to appeal against a finding by a jury on a preliminary issue at the Central Criminal Court that he was unfit to plead by reason of a disability under s. 4 of the Criminal Procedure (Insanity) Act, 1964. MACKENNA, J., under s. 5 (1) (c) of the Act, sentenced him to be admitted to such hospital as might be specified by the Secretary of State.

R. H. K. Frisby for the appellant.

R. D. Harman for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was indicted last year for the murder on board a British ship of a member of the crew called Knight. On Nov. 6 at the Central Criminal Court, before he was arraigned, a finding of disability was returned that he was not fit to be tried and an order was made under the Criminal Procedure (Insanity) Act, 1964, for his admission to hospital. He now applies for leave to appeal against that finding of disability.

Though the facts which the Crown would allege and the defence which the appellant would raise are not strictly material here, it is as well to see the background. The appellant almost all his life has suffered from some form of persecution mania directed against freemasons and the unions in America, where he has resided and worked, and it is quite clear that on this voyage from Australia to this country he had the feeling that people, members of the crew, of which he and Mr. Knight, were members, were persecuting him by putting noxious, chemical powders on his clothes and so on. In regard, however, to the fight which undoubtedly developed between himself and Mr. Knight he appeared to be quite lucid and clear that he was attacked by Mr. Knight and that in self defence he stabbed him with a knife. He freely admits the killing and regrets the killing, but says that it was in self defence.

At the Central Criminal Court the Crown informed the jury that there was a preliminary issue to be tried. Junior counsel for the appellant attended the opening of the proceedings at the Central Criminal Court out of courtesy to the court to say that his and his leader's instructions had been withdrawn by the appellant. Thereupon a jury was empanelled and the case was opened by the Crown that the appellant was unfit to stand his trial. Reference was made to the fact that the doctors would say that he had suffered from delusions and persecution mania and reference was made, as is always made in these cases,

to the question of whether he was of sufficient understanding to plead, to challenge jurors, to instruct counsel, to understand the evidence and the like. Two eminent doctors were called by the Crown and none were called by the defence, and the jury, after listening to a statement by the appellant and a short summing-up by the judge, were, it is to be observed, out of court for something like an hour before they returned this finding of disability.

When this matter first came on before the court as an application on Feb. 1 of this year, the court was somewhat perturbed at the way in which these proceedings had been conducted, and in particular one point which arose was that the learned judge in the summing-up made no reference whatever either to the burden of proof or the standard of proof necessary in such a case. As a result, the court granted legal aid and invited the Crown to be present. Now on this renewed application counsel for the appellant takes two points. One does concern this burden and standard of proof, but I will take that second. I will deal first with counsel's other point, which is really this: that in opening, in the evidence and in the summing-up the jury were being directed to matters which did not form the test of disability. As is well known now, the matter is dealt with in the Criminal Procedure (Insanity) Act, 1964, which talks of an accused being under a disability and the disability is the disability which heretofore had been dealt with in the Criminal Lunatics Act, 1800, which speaks of a person being insane so that he cannot be tried on the indictment. What happened was, if I may take it shortly, that counsel for the Crown in opening referred more than once not merely to the ability of the appellant to instruct counsel, but to instruct counsel "properly", putting before the jury the question whether the appellant was "properly able" to defend himself and was of sufficient intellect to give evidence on his own behalf, and in their evidence the doctors—and one is not blaming them because they were put in the form of leading questions—gave answers dealing with the fact that he might not be able "properly" to instruct counsel, "properly" to challenge jurors, to give "proper" evidence and so on. I take as an illustration Dr. Terry, who was asked:

"... do you think he is a position, or would have been in a position, to instruct solicitors and counsel properly in his defence? A.—No. Q.—Do you think he would be in a position to make up his mind properly as to whether or not he wished to be defended by a solicitor or counsel. A.—No... Q.—Would he be able properly to follow and apprehend the course of a criminal trial? A.—Not properly, no... Q.—Would he be of sufficient intellect to give proper evidence in the course of the trial. A.—No."

Moreover Dr. Neustatter in answer to similar questions gave similar answers. He was asked whether the appellant could make proper decisions and so on during the course of his trial; was he in a position adequately to defend himself or give proper instructions, and so on. Then finally, the learned judge in summing-up to the jury said this:

"A man is fit to plead only if he is in a sufficient state of mind to apprehend the course of the proceedings at his trial so as to make a proper defence..."

[Dr. Terry] told you that the [appellant's] way of thinking was altered by his false beliefs about persecution and he added that in his view the [appellant] was not able to give proper evidence at his trial."

Counsel for the appellant says that that introduction of the word "properly" throughout is introducing a matter which is either quite irrelevant or, to say the least, is very confusing, because he maintains that an accused would be fit to stand his trial even if, though understanding everything that was going on, he wrongly or unwisely or inaccurately did certain things.

That this is a somewhat odd case becomes clear in this respect from later reports which have been received by this court. Dr. Neustatter in particular has had his mind directed to the sort of point with which we are concerned here and it is quite clear from answers that he gave to a questionnaire that was put to him that he was saying, for instance, that this appellant clearly is capable of understanding his right to challenge jurors but he, Dr. Neustatter, fears that his delusional thinking might cause him to use his challenges wrongly or unwisely. Again Dr. Neustatter says that he is entirely capable of understanding the legal effect of pleas of guilty and not guilty, etc., but he fears that his delusional thinking, from which he suffers, might cause him to act otherwise than in his best interests; in other words, unwisely, and so on. The same also appears from other reports before this court.

The test which is always referred to in these cases and which has been confirmed and followed over and over again is to be found in *R. v. Pritchard* (1) in which ALDERSON, B., in dealing with a deaf mute, said this to the jury:

"There are three points to be inquired into:—*First*, whether the prisoner is mute of malice or not; *secondly*, whether he can plead to the indictment or not; *thirdly*, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defence—to know that he might challenge any of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation."

Counsel for the appellant submits that the appellant on the evidence here appears to have had a complete understanding of the legal proceedings and all that is involved and, although he suffers from delusions which at any moment might interfere with a proper action on his part, that is not a matter which should deprive him of his right of being tried. This court has come to the conclusion that this trial was unsatisfactory in that respect. The jury may have thought that the mere fact that he was not capable of doing things which were in his best interests was sufficient to enable them to return that finding of disability.

One other matter in regard to this concerns the burden of proof and it is to be noticed that Dr. Neustatter, at any rate, who found this a very difficult case, only came to the conclusion that he was unfit to stand his trial on a balance of probabilities. It has been urged by counsel for the appellant—and it is to be noted that counsel for the Crown concedes—that of course where the matter is raised by the Crown the burden is on the Crown, and it is further conceded—and this court thinks, rightly conceded—that the standard of proof in such a case is the ordinary standard in criminal cases of proof beyond a reasonable doubt.

For both those reasons, this court has come to the conclusion that leave to appeal ought to be given in this case, that this should be treated as the hearing of the appeal and that the finding of disability should be quashed.

Appeal allowed.

Solicitors: *Kingsley Napley & Co.; Director of Public Prosecutions.*

T.R.F.B.

(1) (1836), 7 C. & P. 303.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(SIR JOCELYN SIMON, P., AND REES, J.)

July 3, 31, 1968

ROBERTS v. ROBERTS

Husband and Wife—Maintenance—Amount—Consideration of all relevant circumstances—Standard of support for wife—Encumbrances existing at time of marriage—Obligations of second marriage.

A court, when fixing the amount of maintenance or permanent alimony, is bound to have regard to all the relevant circumstances of each particular case, including obligations and advantages which may not be legally enforceable. An innocent wife is generally entitled to be supported at a standard as near as possible to that which she enjoyed before cohabitation was disrupted by the husband's wrongful conduct. In any case she ought not to be relegated to a significantly lower standard than that which her husband enjoys, and she ought not to be forced to have recourse to supplementary benefit from the Ministry of Social Security unless her husband and his household are also at subsistence level. On general principle a spouse must on marriage be presumed (except in cases falling within s. 9 of the Matrimonial Causes Act, 1965) to take the other subject to all existing encumbrances, whether known or not, e.g., a charge on property, an ailment which impairs earning capacity, or an obligation to support the wife or child of a dissolved marriage. So long as an aggrieved wife has a choice whether or not to seek dissolution, so long as she has alternative remedies, there is no injustice in requiring the court to take into account obligations from a second marriage, particularly if the just claims of the first wife are not, in any event, to be ignored. It must be rare, however, when the aggrieved wife has sought an alternative remedy, for it to be right that her claim to support should be postponed to the claim of a mistress, even though this must be taken into account for whatever weight it is held to bear.

APPEAL by the wife from a separation order made by justices sitting in the Prestatyn Domestic Proceedings Court, on Jan. 12, 1968, when they directed that the husband should pay 30s. per week by way of maintenance for the wife and 20s. a week by way of maintenance for the child on the grounds of the husband's adultery, desertion, and failure to make reasonable provision for herself and the child.

Elaine Jones for the wife.

W. H. Joss for the husband.

Cur. adv. vult.

July 31. REES, J., read the following judgment of the court: This appeal raises a question of general importance, namely, to what extent, if at all, justices should take account of "obligations" to support a woman with whom he is cohabitating and her children, assumed by a husband who has disrupted his own marriage, when fixing the amount of weekly maintenance to be awarded to his wife. Such "obligations" are sometimes, a little quaintly though conveniently, called "moral obligations", to distinguish them from "legal obligations" (that is, those which could be enforced before a court of law), such as the obligation on a divorced man to support an after-acquired wife; and we propose to adopt this nomenclature. It will be necessary for us to consider also the relevance of such "legal obligations" in maintenance proceedings, if only because the claim of a mistress can hardly rank higher than that of an after-taken wife. In spite of the importance of these questions, there is little authority to be found in reported decisions in this country. In the dearth of authority, we have enquired into the practice of our brother judges in the Division and the registrars of the Principal Probate Registry.

The question arises on an appeal from a wife from a decision of the justices sitting in the Prestatyn Domestic Proceedings Court on Jan. 12, 1968. The justices had before them four complaints laid by the wife against the husband, namely, that he had committed adultery with a woman (a Mrs. B.) on divers dates on or prior to Nov. 28, 1967; that he had deserted his wife on Apr. 7, 1967; and that he had wilfully neglected to provide reasonable maintenance for her and for the child of the family. The husband did not appear before the justices nor was he represented, but they had before them a letter from his solicitors which admitted adultery, desertion and the failure to provide maintenance. The wife gave evidence, and the justices found each one of the complaints proved. There is no appeal against these findings. The justices thereafter made a separation order, and directed that the husband should pay 30s. per week by way of maintenance for the wife and 20s. per week by way of maintenance for the child. The wife now appeals against the amount of maintenance awarded for herself and the child, on the ground that it is inadequate.

The parties were married on Mar. 26, 1955, and a boy was born to them on Jan. 5, 1957. According to the wife the marriage was not very happy for some time before the husband left her; and their relations deteriorated still further when Mrs. B. came to live opposite the matrimonial home. On about Apr. 8, 1967, the husband left the wife to live at Nottingham with Mrs. B. and her three children. Thereafter the husband never communicated with his wife, nor sent her or their child any money. The wife had been, and was at the time of the hearing, living solely on a weekly payment of £8 16s. granted by the Ministry of Social Security for herself and the child. Out of this sum she spent a total of £4 14s. on rent, insurances, a judgment debt and coal. She and the child had the balance of £4 2s. to provide for food, electricity, clothing and all other requirements. The husband's financial position was considered by the justices on the basis of the facts stated in the letter from his solicitors. They found that his average weekly wage was approximately £22 after deduction of tax. Among his outgoings he was making payments amounting to £2 10s. per week "in respect of hire-purchase payments incurred whilst he was living with his wife". (It was common ground before us that the justices had been misled by a mistake in the letter and that the amount of this weekly item should have been £1 15s. and not £2 10s.; also, that the item was the total of certain other payments enumerated in the letter, which could not all properly be described as "hire-purchase payments".) There seems, however, no reason to disturb the finding of the justices that this item (corrected to £1 15s. per week) was in respect of a continuing indebtedness incurred when the husband was living with the wife. In addition, the husband was stated to be making payments in respect of rent, food, television, hire-purchase instalments and coal, amounting to a total sum of about £14 9s. a week.

Since leaving the wife, the husband had been living with Mrs. B. and her children of whom one, a girl aged one year, had died a few days before the hearing. The surviving children were C.B. (a boy) aged six years, W.G. (a boy) aged four years, and C.G. (a girl) aged three years. Mrs. B. received a weekly payment of £1 9s. by way of maintenance for C.B. from his father (described as "her former husband"). But she received no payment from the father of W.G. and C.G.; he was dead. Mrs. B. did not earn any money. She and her children were being wholly maintained by the husband out of his earnings of £22 per week, plus the weekly payment of £1 9s. received for C.B.—making a total weekly income coming into the household of £23 9s., plus, presumably, appropriate family allowances. The husband was not able to marry Mrs. B.

because his own marriage was still subsisting; and it was conceded before us that he was not legally bound to make any payments for the support of Mrs. B. or any of her three children. Mrs. B. was pregnant at the date of the hearing, and we were informed that ten days thereafter she gave birth to a child of whom the husband was the father. In these circumstances, it is clear that a very substantial part of the weekly outgoings of the husband (amounting to about £14 9s.) related to the upkeep of Mrs. B. and her children, even allowing for the payment she received for C.B.'s maintenance.

The justices in their reasons seem to have assumed that £1 9s. per week was sufficient to maintain C.B. The crucial passage in their reasons is as follows:

"The [husband's] solicitors' letter went on to state that the [husband] was wholly maintaining Mrs. B. (with whom he lived) and two of her children, the responsibility for whom he had apparently accepted. In making an order in favour of the [wife], we took into consideration the fact that [the husband] was making payments amounting to £2 10s. per week in respect of hire-purchase payments incurred while he was living with his wife. Having regard to the [husband's] responsibilities, we felt that the proper order for maintenance in favour of the wife should be £1 10s. per week and £1 per week in respect of the child of the marriage."

(In this extract, the amount of £2 10s. must be corrected to £1 15s.) The result of this order is that the wife and the child of the marriage will receive £2 10s. a week and will continue to live on social security benefits, no doubt reduced *pro tanto*; whereas the husband, his mistress and two of her children, together with the baby born in January, 1968, will live on his earnings of £22 per week (less £2 10s. maintenance and the £1 15s. described as the "hire-purchase payments", namely, a balance of £17 5s. per week), plus such family allowances as might be due. This result can only have been achieved by the justices treating the husband's acceptance of an obligation to support his mistress and her children as an allowable outgoing, ranking in priority to his obligation to support the wife and the child of the marriage; and it is in this sense that we read the justices' reasons.

Counsel for the wife argued that the justices were wrong in taking account of such obligations when fixing the amount of the wife's maintenance; that the proper approach was for the court to ignore all liabilities of the husband in relation to his mistress and her children and to assess the wife's maintenance in the normal way, having regard to the standard of living the wife and the child of the marriage would have enjoyed had the husband remained a member of their household. She argued that the application of any principle must be wrong which resulted in the lawful wife and child being compelled to live at subsistence level on moneys provided by the state, while the husband, found guilty of grave matrimonial offences, continued to support himself, his mistress and her children from his adequate earnings; and that this result showed that the decision was plainly wrong and unjust.

The power of the justices to award maintenance to the wife arose under s. 2 (1) (b) of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, whereby they might make:

"a provision that the husband shall pay to the wife such weekly sum not exceeding £7 10s. as the court considers reasonable in all the circumstances of the case."

Their power to make an order for the maintenance of the child of the family arose under para. (h) of the same subsection, whereby they might make:

"a provision for the making by the defendant . . . for the maintenance of any child of the family, of payments by way of a weekly sum not exceeding . . . in respect of any one child the sum of £2 10s. . . ."

The history of the provisions giving power to order maintenance for a wife was traced in *Courtney v. Courtney* (1), where it was held that justices were entitled to take into account the conduct of both parties, together with all other circumstances, when fixing the amount of the weekly sum by way of maintenance awarded to a wife. It was also there held that the justices' discretion as to the quantum of maintenance should be exercised on the same principles as those adopted in the High Court. (The limitations on the maximum amounts which can be ordered for the maintenance of a wife or a child were removed by the Maintenance Orders Act, 1968, which came into force on July 3, 1968.) We take it to be axiomatic that "the circumstances of the case" means "the relevant circumstances of the case".

The problems to be solved on this appeal are, therefore: (i) whether the fact that a husband is providing financial support for a mistress and for children whom he is not legally bound to support is one of the "relevant circumstances of the case" which may be taken into account; and (ii) if it is, whether there are any principles which govern the extent to or manner in which account should be taken of these facts, and in particular whether any priority should in general be observed in relation to, on the one hand, legal obligation to support a wife and a child of the marriage, and, on the other, "moral" obligations to support a mistress and her children.

As to the first question, it was argued on behalf of the wife that, as a matter of law, the phrase "all the circumstances of the case" did not include the payment of moneys in performance of "moral obligations", but only included payments made in respect of obligations enforceable at law. On this argument, payments for the support of a mistress or an illegitimate child are to be equated with such outgoings as payments for promiscuous sexual intercourse, or drink, or gambling, or indeed any personal satisfactions of the husband's which are not legally enforceable. In our judgment, this argument cannot succeed. In the first place, so to hold would be in effect to put a fetter on a discretion which is on the face of it and desirably unfettered. In *Bellenden (formerly Satterthwaite) v. Satterthwaite* (2), EVERSHED, L.J., said of the comparable words of the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14 (2), dealing with maintenance in the High Court:

" . . . it is neither necessary nor desirable to attempt any gloss on, or any further definition of, the clear general language of the subsection."

In *Wood v. Wood* (3) LINDLEY, L.J., said, again in respect of maintenance in the High Court:

"The circumstances which have to be taken into account are: (i) the conduct of the parties; (ii) their position in life and their ages and their respective means; (iii) the amount of the provision actually made; (iv) the existence or non-existence of children, and who is to have the care and custody of them; (v) any other circumstances which may be important in any particular case."

SCARMAN, J., in *Kirke v. Kirke* (4) found those words:

(1) 130 J.P. 93; [1966] 1 All E.R. 53.

(2) [1948] 1 All E.R. 343.

(3) [1891-94] All E.R. Rep. 506; [1891] P. 272.

(4) [1961] 3 All E.R. 1059.

"... to be as good a guide as any that I have found to the exercise of a discretion which, so long as it be exercised judicially on the particular facts of the case, must remain unfettered."

Secondly, no hard and fast line can be drawn between "legal" and "moral" obligations. Such obligations frequently involve the support and maintenance of children, and in this context nice distinctions between whether or not they are enforceable in law at any relevant time are often impracticable of application and in any event undesirable. Merely by way of example, we cite the following: an obligation to support an illegitimate child under an affiliation order; an obligation to support an illegitimate child in respect of whom an affiliation order might be obtained, but is obviated by actual support of the child; an obligation to support an illegitimate child in respect of whom no affiliation order can be obtained owing to the effluxion of time within which affiliation proceedings must be taken.

Thirdly, we think that there is some authority which indicates that this contention put forward on behalf of the wife is not correct. In *Cockburn v. Cockburn* (1) HODSON, L.J., in the course of a judgment with which PARKER and ORMEROD, L.JJ., agreed, said:

"After he was divorced, he married again. His second wife had a child already and he has undertaken the moral obligation of supporting that child and the legal obligation of supporting the second wife. He and the second wife now have a child, and he is under the legal obligation of supporting that child."

In a further passage in this judgment to which we refer later, HODSON, L.J. pointed out that the court has to take into account such moral obligations. *Donaldson v. Donaldson* (2) is of indirect assistance, in that the court was there concerned with an advantage, not an obligation, which was not legally enforceable. In proceedings based on a finding of wilful neglect to maintain a wife, KARMINSKI, J., took into account when considering the quantum of maintenance the fact that a husband had made over the whole of his capital assets to his mistress, who had invested them in a business venture. From this business the husband derived nothing except his living, and it does not appear to have been argued before or found by the learned judge that the husband had any legally enforceable right to compel his mistress to provide his living. Nevertheless, KARMINSKI, J., ordered the husband to pay to his wife and children the whole of his income from all other sources. *Ette v. Ette* (3) was a similar case. LLOYD-JONES, J., took into account the benefits, financial and in kind, derived by the husband from his association with a rich mistress. It is true that the learned judge took the view that the reality was that the husband had become his mistress's business manager and partner and was, therefore, entitled to payment for his services; but, in our view, the general tenor of the judgment shows that the learned judge was prepared to take account of the actual benefits which the husband derived from his mistress, whether legally enforceable or not. He used such expressions as "whatever the legal technicality may be", and found that it was plain that the husband's association with his mistress was such that he was "in a position to draw as much as he wished, either from the company or from [the mistress] personally".

Finally, we find that it is the practice of the judges and registrars of this Division to refuse to draw a rigid line between legally enforceable obligations

(1) [1957] 3 All E.R. 260.

(2) [1958] 2 All E.R. 660.

(3) [1965] 1 All E.R. 341.

and "moral" obligations or to insist on shutting their eyes to the latter; as we have indicated, these can vary almost infinitely in weight.

Our conclusion, therefore, based on principle, authority and practice, is that, when fixing the amount of maintenance, or permanent alimony, a court is entitled (indeed, is bound) to have regard to all the relevant circumstances of each particular case, including obligations and advantages which may not be legally enforceable.

The second (and, in our judgment, the much more difficult) question is whether it is open to this court to state any principles or guidelines which should be observed when considering the weight or the order of priority to be accorded to the various classes and kinds of obligations or advantages, whether legally enforceable or not. We have felt some diffidence about this, since the possible circumstances are of almost infinite variety and it is desirable that magistrates should feel free to make such order as meets the justice of the particular case. We have been led to think, however, that, subject to this proviso, some general guidance might be welcomed, and, in view of the fact that we have come to the conclusion that there must be a re-hearing of this complaint, we are bound to state why we think that the present order is wrong. We feel that it might be helpful if we approached this problem by considering the case where a husband guilty of disrupting the marriage has been divorced and has remarried, since, as we have indicated at the beginning of this judgment, neither he nor his mistress can claim to be in a better position, or to put his wife in a worse, by contracting an irregular union. The general considerations to be borne in mind by justices in assessing maintenance (not to be regarded as touchstones or as exhaustive rules of universal application) were recently summarised in this court in *Kershaw v. Kershaw* (1), *Ashley v. Ashley* (2), and *Attwood v. Attwood* (3), which may conveniently be taken as a point of departure. An innocent wife is generally entitled to be supported at a standard as near as possible to that which she enjoyed before cohabitation was disrupted by the husband's wrongful conduct. In any case, she ought not generally to be relegated to a significantly lower standard than that which her husband enjoys; and she ought not to be forced to have recourse to supplementary benefit from the Ministry of Social Security unless her husband and his household are also at subsistence level. Moreover, we think that, on general principle, a spouse must on marriage be presumed (except in cases falling within s. 9 of the Matrimonial Causes Act, 1965) to take the other subject to all existing encumbrances, whether known or not—for example, a charge on property, or an ailment which impairs earning capacity, or an obligation to support the wife or child of a dissolved marriage. Some Commonwealth courts have drawn the logical conclusions from these considerations; the primary obligation of a husband is to provide for his first wife (and their children) and subsequent wives (and their children) must take him subject to the accrued rights to support of his previous families. Thus, in *Davis v. Davis* (4) BARRY, J., a matrimonial judge of great experience, said:

"... if a husband of means irretrievably destroys the reality of a marriage, and it appears that he contemplates marriage with another woman whom he prefers to his wife, the court should ensure that he pays to the spouse he is repudiating whatever, having regard to his means and his conduct towards her, and her conduct towards him, is fair and reasonable, recognising that he is pursuing his own gratification in disregard of the obligations he

(1) 128 J.P. 589; [1964] 3 All E.R. 635; [1966] P. 13.

(2) 130 J.P. 1; [1965] 3 All E.R. 554.

(3) ante, p. 554.

(4) [1964] V.L.R. 278.

undertook. In doing so the court is not 'punishing' the husband; it is merely insisting that before he shall have the gratification he desires, he shall make fair amends for breaking the promise which marriage involves."

Much the same view as to priorities in relation to "a husband of means" was taken here in *Sansom v. Sansom* (1), a case of permanent alimony after judicial separation. In New Zealand, the doctrine seems to have been applied in all its rigour, even in relation to parties of small means: see *Burton v. Burton* (2); *Richards v. Richards* (3), and *Lyne v. Lyne* (4), per FINLAY, J. The rule is most clearly stated by SMITH, J., in his reserved judgment in *Richards v. Richards*:

"One of the principles applied in divorce is that the primary duty of a guilty respondent who has re-married is to maintain his innocent first wife."

And again:

"The true view is, I think, that, where a decree absolute has been made, the guilty party is entitled to re-marry, but, if he does so and his means are limited and hardship must ensue, the court in distributing the available funds will give preference to the needs of the innocent first wife."

In England, however, we think that the emphasis is slightly different where people of small means are concerned. In our view, authoritative guidance is given in a further passage from the judgment of HODSON, L.J., in *Cockburn v. Cockburn* (5), from which we have already quoted. He is reported as saying,

"... it is quite impossible for the courts to ignore the just claims of the first wife because the man has taken on himself other obligations, although the courts have to take into account those obligations as involving a reduction in the capacity of the man to pay for the upkeep of his first wife."

When HODSON, L.J., used the words "take into account", we think that he had in mind the approach described by LORD MERRIMAN, P., in *Collins v. Collins* (6) (cited with approval by SIR RAYMOND EVERSHER, M.R., in *Powell v. Powell* (7)):

"I ventured, in *Chichester v. Chichester* (8) to say that there were certain sums which, though they could not be dealt with as a matter of strict calculation on one side or other of the account, had to be taken into account ... to arrive at a just solution ..."

In *Attwood v. Attwood* (9), this court drew a distinction between matters which should be "brought into account" and those which should be "taken into account". This approach accords, we find, with the general practice of judges and registrars; after a formal computation they frequently give weight to other relevant considerations. As contrasted with the more rigid line taken by the New Zealand courts, this seems to us to have the merit of realism; it is little use ordering a man to pay what is beyond his capacity, or on which he will in every probability default. Moreover, HODSON, L.J., was expressly framing his observations with reference to the statutory right of an aggrieved wife to

(1) [1966] 2 All E.R. 396; [1966] P. 52.

(2) [1928] N.Z.L.R. 496.

(3) [1942] N.Z.L.R. 313.

(4) [1951] N.Z.L.R. 287.

(5) [1957] 3 All E.R. 260.

(6) [1943] 2 All E.R. 474; [1943] P. 106.

(7) [1951] P. 257.

(8) [1936] 1 All E.R. 271; [1936] P. 129.

(9) ante, p. 554.

seek divorce, with its concomitant that both parties have thereafter licence to re-marry. So long as an aggrieved wife has a choice whether or not to seek dissolution, so long as she has alternative remedies, we can see no injustice in requiring the courts to take into account obligations from a second marriage, particularly if, as HODSON, L.J., said, the just claims of the first wife are not, in any event, to be ignored. We think it follows, however, that it must be rare, when the aggrieved wife has sought an alternative remedy (as in the present case), for it to be right that her claim to support should be postponed to the claim of a mistress, even though this must be taken into account for whatever weight it is held to bear.

We think that, in the present case, the just claims of the wife and the child of the marriage have been virtually ignored. In our view, there was no evidence which justified the magistrates in preferring the obligations owed to Mrs. B. and her children to those owed to the wife and the child of the marriage. We think that the result is plainly unjust to the wife and child. In these circumstances, even though the appeal involves a review of a discretionary jurisdiction, we are bound to set the order aside: see *Bellenden (formerly Satterthwaite) v. Satterthwaite* (1). We have considered whether, with a view to saving further time and expense, we can ourselves make a maintenance order in place of that set aside, but we feel that there are too many uncertainties for us to be able to take this course. Even assuming (as we think is justified) that neither the wife nor Mrs. B. has any earning capacity, there are still the following matters that require ascertainment: (a) is £1 9s. a week adequate support for C.B. and, if not, can it be varied at the expense of his father?; (b) is Mrs. B. eligible for supplementary benefit in respect of W.G. and C.G.?; (c) is she herself eligible for supplementary benefit? In this connexion we would draw attention to the power of justices under s. 60 of the Magistrates' Courts Act, 1952, to direct that a probation officer should investigate and report on the means of the parties to proceedings such as these.

Since the matter must be re-heard, we would finally wish to give some guidance as to the payments made by the husband in respect of commitments entered into during cohabitation. Such commitments will generally be assumed in consideration of some advantage—for example, mortgage repayments in respect of occupation of a house; hire-purchase payments in respects of household goods or a car. If cohabitation had not been disrupted, a wife would have suffered in her standard of living in discharge of the commitment, but would have gained a concomitant advantage in enjoyment of the subject-matter of the commitment. Accordingly, the justices may properly bring into account against a wife the extent to which she is continuing to enjoy any part of the benefit of the transaction.

In the result, we allow the appeal. We set aside so much of the order appealed from as relates to the maintenance of the wife and the child. In accordance with usual practice, we remit these issues for determination by a different panel of the same bench. We propose to make an interim order, on the amount of which we should like to hear counsel. We should, however, make it clear that our interim order [of £4 a week for the wife and £2 a week for the child] does not imply in any way any opinion of what we think the final order should be.

Appeal allowed.

Solicitors: *Hatcheth Jones & Co.*, for *J. Kerfoot-Roberts, Son & Griffiths*, Holywell; *Gibson & Weldon*, for *Crockford & Anderson*, Nottingham.

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., JAMES AND BRIDGE, JJ.)

July 1, 31, 1968

FAGAN v. METROPOLITAN POLICE COMMISSIONER

Assault—Battery—Apprehension of violence—Actus reus and mens rea—Continuing act—Police officer in execution of duty.

An assault is any act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal violence. Although "assault" is an independent crime and is to be treated as such, for practical purposes today "assault" is generally synonymous with the term "battery", and is a term used to mean the actual intended use of unlawful force to another person without his consent. Where an assault involves a battery, it matters not whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. To constitute this offence, some intentional act must have been performed; a mere omission to act cannot amount to an assault.

A distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault.

For an assault to be committed, both the elements of *actus reus* and *mens rea* must be present at the same time. It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed on an existing act. On the other hand, the subsequent inception of *mens rea* cannot convert into an assault an act which has been completed without *mens rea*.

The appellant was reversing his car from a road on to a pedestrian crossing and was directed by a police constable to drive it forward to the kerb. The constable pointed out a suitable place at which to park. At first the appellant stopped too far from the kerb, and, on a definite parking place being pointed out by the constable, drove forward and stopped the car with the offside wheel on the constable's left foot. It was not clear whether the appellant had done this intentionally or accidentally. The constable told the appellant to get off his foot and received abuse in return. He repeated his instructions several times and the engine of the car stopped running. At some point the appellant turned off the ignition. Finally, the appellant slowly turned on the ignition and reversed the car off the constable's foot. The appellant was convicted of assaulting the constable in the execution of his duty, contrary to s. 51 of the Police Act, 1964. On appeal.

HELD: (BRIDGE, J. dissenting) that the conviction was right, as the conduct of the appellant could not be regarded as mere omission or inactivity; there was an act constituting a battery which at its inception was not criminal because the element of intention had not been proved, but became criminal from the moment when it was established that the intention was formed to produce the apprehension which flowed from the continuing act.

CASE STATED by the quarter sessions for the Middlesex area of Greater London.

On Sept. 4, 1967, at Willesden magistrates' court the appellant, Vincent Martel Fagan, was convicted of assaulting David Morris, a constable of the Metropolitan Police Force, on Aug. 31, 1967, when in the execution of his duty, contrary to s. 51 of the Police Act, 1964. The appellant appealed to the Middlesex Quarter Sessions.

On the hearing of the appeal on Oct. 25, 1967, the following facts were either proved or admitted. P.C. David Morris was at all material times in the execution of his duty. On Aug. 31, 1967, the appellant drove a motor vehicle in Fortunategate Road, London, N.W.10 (hereinafter referred to as "the said road"), near the junction with Craven Park Road, London, N.W.10. While the appellant was in the course of reversing his motor vehicle from the said road on to a pedestrian crossing in Craven Park Road, P.C. Morris asked the appellant to pull into the said road

against the north kerb so that he could ask the appellant to produce documents relating to the appellant's driving. First of all the vehicle stopped and it did not move. P.C. Morris, who had walked into the middle of the said road, pointed out to the appellant a suitable parking place against the kerb of the said road. The appellant drove the vehicle towards P.C. Morris and stopped it with its near side a substantial distance from the kerb. P.C. Morris went up to the appellant and asked him to park the vehicle closer to the kerb. P.C. Morris walked to a position about one yard in front of the vehicle and pointed to the exact position against the kerb. The appellant drove the vehicle in the direction of P.C. Morris and stopped it with its front offside wheel on P.C. Morris's left foot. P.C. Morris said to the appellant, "Get off, you are on my foot." The appellant's driving window was open. The appellant said "F— you, you can wait." The appellant then turned off the ignition, or at least the engine stopped running. P.C. Morris then said to the appellant several times, "Get off my foot." The appellant then said very reluctantly, "Okay man, okay." The appellant thereafter very slowly turned on the ignition and reversed the vehicle off P.C. Morris's foot. As a result of the appellant's act or omission P.C. Morris's left big toe was injured. The toe was swollen and slightly bruised.

It was contended for the appellant that P.C. Morris was uncertain that the appellant deliberately mounted the wheel of his vehicle on to P.C. Morris's foot. To establish the charge of assault, the prosecution must prove that it was deliberate on the appellant's part. The incident might have been accidental. At any rate it was not proved to the satisfaction of the court that what the appellant was alleged to have done was done by him deliberately. It was further contended for the appellant that, if one drove a vehicle over some part of a man's body, that might be accidental, but if one held it there it required a rather more positive act and if one did hold the vehicle in the said manner it was not an assault, because the actual assault, whether it was by accident or not, was that the vehicle got on to the foot; the fact that the driver might have taken a little longer to take it off—if the court accepted the time deposed by P.C. Morris that is to say, twenty-five seconds—could not be an assault, because the assault had already taken place. It was also contended for the appellant that the continued pressure on P.C. Morris's foot was not a fresh assault. It was contended for the respondents that, if the vehicle was deliberately left in a position where pressure was still being exerted and if the appellant had reasonable time in which to get the vehicle off P.C. Morris's foot and if the appellant in these circumstances left the vehicle on P.C. Morris's foot, an assault in law would commence as soon as the reasonable time had elapsed for the appellant to get the vehicle off altogether; if the appellant deliberately delayed in getting the vehicle off, that would be an assault in law.

On the facts stated above, the deputy chairman and the justices were left in doubt whether the initial mounting of the motor wheel on P.C. Morris's foot was intentional on the part of the appellant or accidental. They were satisfied beyond all reasonable doubt that the appellant knowingly, provocatively and unnecessarily allowed the motor wheel to remain on P.C. Morris's foot after P.C. Morris said, "Get off, you are on my foot". On the facts stated and on the findings set out in this paragraph, the deputy chairman and the justices came to the conclusion that the charge of assault on P.C. Morris had been made out, and dismissed the appeal. The appellant now appealed.

A. M. Abbas and I. Hazar for the appellant.

J. W. Rant for the respondent.

Cur. adv. vult.

July 31. **LORD PARKER, C.J.:** I will ask **JAMES, J.**, to read the judgment which he has prepared, and with which I entirely agree.

JAMES, J., read the following judgment: The appellant, Vincent Martel Fagan, was convicted by the magistrates at Willesden of assaulting David Morris, a police constable, in the execution of his duty on Aug. 31, 1967. He appealed to quarter sessions. On Oct. 25, 1967, his appeal was heard by Middlesex quarter sessions and was dismissed. This matter now comes before the court on appeal by way of Case Stated from the decision of quarter sessions. The sole question is whether the prosecution proved facts which in law amounted to an assault. [His LORDSHIP stated the facts, and continued:] The justices at quarter sessions on those facts were left in doubt whether the mounting of the wheel on to the officer's foot was deliberate or accidental. They were satisfied, however, beyond all reasonable doubt that the appellant "knowingly, provocatively and unnecessarily" allowed the wheel to remain on the foot after the officer said "Get off, you are on my foot". They found that, on these facts, an assault was proved.

Counsel for the appellant relied on the passage in **STONE'S JUSTICES MANUAL** (1968 Edn.), Vol. 1, p. 651, where assault is defined, viz., "An assault is an attempt by force, or violence, to do bodily injury to another. It is an act of aggression done against or upon the person of another without his consent; not necessarily against his will, if by that is implied an actual resistance or expression of objection made at the time . . ." He contends that, on the finding of the justices, the initial mounting of the wheel could not be an assault, and that the act of the wheel mounting the foot came to an end without there being any mens rea. It is argued that thereafter there was no act on the part of the appellant which could constitute an actus reus, but only the omission or failure to remove the wheel as soon as he was asked. That failure, it is said, could not in law be an assault, nor could it in law provide the necessary mens rea to convert the original act of mounting the foot into an assault. Counsel for the respondent argues that the first mounting of the foot was an actus reus, which act continued until the moment of time at which the wheel was removed. During that continuing act, it is said, the appellant formed the necessary intention to constitute the element of mens rea and, once that element was added to the continuing act, an assault took place. In the alternative, counsel argues, that there can be situations in which there is a duty to act and that, in such situations, an omission to act in breach of duty would in law amount to an assault. It is unnecessary to formulate any concluded views on this alternative.

In our judgment, the question arising, which has been argued on general principles, falls to be decided on the facts of the particular case. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. Although "assault" is an independent crime and is to be treated as such, for practical purposes today "assault" is generally synonymous with the term "battery", and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case, the "assault" alleged involved a "battery". Where an assault involved a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand on another, and the action does not cease to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim. So, for our part, we see no difference in principle between the action of stepping on

to a person's toe and maintaining that position and the action of driving a car on to a person's foot and sitting in the car while its position on the foot is maintained.

To constitute this offence, some intentional act must have been performed; a mere omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault; they can only shed a light on the appellant's action. For our part, we think that the crucial question is whether, in this case, the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot, or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment, a distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault. For an assault to be committed, both the elements of *actus reus* and *mens rea* must be present at the same time. The "*actus reus*" is the action causing the effect on the victim's mind: see the observations of PARKE, B., in *R. v. St. George* (1). The "*mens rea*" is the intention to cause that effect. It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed on an existing act. On the other hand, the subsequent inception of *mens rea* cannot convert an act which has been completed without *mens rea* into an assault.

In our judgment, the justices at Willesden and quarter sessions were right in law. On the facts found, the action of the appellant may have been initially unintentional, but the time came when, knowing that the wheel was on the officer's foot, the appellant (i) remained seated in the car so that his body through the medium of the car was in contact with the officer, (ii) switched off the ignition of the car, (iii) maintained the wheel of the car on the foot, and (iv) used words indicating the intention of keeping the wheel in that position. For our part, we cannot regard such conduct as mere omission or inactivity. There was an act constituting a battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant's argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.

BRIDGE, J.: I fully agree with my Lords as to the relevant principles to be applied. No mere omission to act can amount to an assault. Both the elements of *actus reus* and *mens rea* must be present at the same time, but the one may be superimposed on the other. It is in the application of these principles to the highly unusual facts of this case that I have, with regret, reached a different conclusion from the majority of the court. I have no sympathy at all for the appellant, who behaved disgracefully; but I have been unable to find any way of regarding the facts which satisfied me that they amounted to the crime of assault. This has not been for want of trying; but at every attempt I have encountered the inescapable question: after the wheel of the appellant's car had

(1) (1840), 9 C. & P. 483; 173 E.R. 921.

accidentally come to rest on the constable's foot, what was it that the appellant *did* which constituted the act of assault? However the question is approached, the answer which I feel obliged to give is: precisely nothing. The car rested on the foot by its own weight and remained stationary by its own inertia. The appellant's fault was that he omitted to manipulate the controls to set it in motion again.

Neither the fact that the appellant remained in the driver's seat nor that he switched off the ignition seem to me to be of any relevance. The constable's plight would have been no better, but might well have been worse, if the appellant had alighted from the car leaving the ignition switched on. Similarly, I can get no help from the suggested analogies. If one man accidentally treads on another's toe or touches him with a stick, but deliberately maintains pressure with foot or stick after the victim protests, there is clearly an assault; but there is no true parallel between such cases and the present case. It is not, to my mind, a legitimate use of language to speak of the appellant "holding" or "maintaining" the car wheel on the constable's foot. The expression which corresponds to the reality is that used by the justices in the Case Stated. They say, quite rightly, that he "allowed" the wheel to remain.

With a reluctantly dissenting voice, I would allow this appeal and quash the appellant's conviction.

Appeal dismissed.

Solicitors: *Clintons; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON, L.J., GEOFFREY LANE AND FISHER, J.J.)

July 22, 23, 24, 31, 1968

R. v. CALDER & BOYARS, LTD.

Criminal Law—Obscene publication—Direction to jury—Tendency to deprave and corrupt—Significant portion of persons likely to read—Defence of public good—Onus on defence—Ruling by judge that defence witnesses should be called first—Obscene Publications Act, 1959 (7 & 8 Eliz. 2, c. 66), s. 1 (1), s. 4 (1).

On the construction of s. 1 (1) of the Obscene Publications Act, 1959, as applying to a book, a jury should be directed to consider whether the effect of the book is to tend to deprave and corrupt a significant proportion of persons likely to read it. What amounts to a significant proportion is a matter entirely for the jury to decide.

Where a defence is raised under s. 4 of the Act that the publication was justified as being for the public good, the onus is on the defendant to establish that defence on a balance of probabilities. The jury should be directed that they have to consider the question of public good only if they are convinced that the publication was obscene. In considering that question, they should consider, on the one hand, the number of readers whom they believe would tend to be depraved and corrupted by the publication, the strength of the tendency to deprave and corrupt, and the nature of the depravity and corruption; on the other hand, they should consider the strength of the literary, sociological or ethical merit which they consider the article to possess. They should then weigh up all these factors and decide whether on balance the publication has been proved to be justified as being for the public good.

On a trial involving the issue of public good, a judge may properly exercise his discretion in directing that the defence witnesses on this issue be called first, since the Crown cannot know in advance on which of the grounds in s. 4 the defence intend to rely.



APPEAL by Calder and Boyars, Ltd., against their conviction at the Central Criminal Court before JUDGE ROGERS of publishing an obscene article contrary to s. 2 (1) of the Obscene Publications Act, 1959, when they were fined £100 and ordered to pay £500 towards the costs of the prosecution.

J. C. Mortimer, Q.C., and C. Salmon for the appellants.

J. C. Mathew and M. Corkrey for the Crown.

Cur. adv. vult.

July 31. SALMON, L.J., read the following judgment of the court: At the beginning of 1966 the appellants, who own a comparatively small but well-known and highly reputable publishing business, were minded to publish in this country a book called "Last Exit to Brooklyn", the first novel of an American author, Hubert Selby, Jr., which had been favourably reviewed in the U.S.A. by a number of eminent critics. No one has ever suggested that this is not a serious book or that the appellants did not genuinely believe that it ought to be published in the interests of literature. It was obvious, however, to the appellants that the book was likely to be highly controversial and that there was a real risk that it might be regarded by some as offending against the Obscene Publications Act, 1959. Accordingly, on Jan. 7, 1966, through their then solicitors, they wrote to the Director of Public Prosecutions enclosing a copy of the book and informing him that they proposed to publish it in hard covers at the price of 30s. They said that they thought that the Director on reading the book would have no doubt that it was "a work of very serious intent which is certainly not likely to appeal to those with merely a prurient interest". They intimated that if, contrary to their expectations, the Director did decide to prosecute, the proceedings would be strenuously defended and they asked that the proceedings, if taken, might be taken under s. 2 rather than under s. 3 of the Act of 1959.

On a prosecution under s. 2, a defendant is entitled to be tried by a judge and jury. In proceedings under s. 3 there is no such right. A magistrate may order the book to be forfeited if he considers it to be obscene and that no defence is established under s. 4. It will be necessary later to refer to some of these sections in detail. The appellants received an inconclusive reply on behalf of the Director dated Jan. 14, 1966. This letter finished with the sentence,

"If you find—as I am afraid you will—that this is a most unhelpful letter, it is not because I wish to be unhelpful but because I get no help from the Acts"

an attitude with which this court has considerable sympathy. The appellants then published the book towards the end of January, 1966. It was most favourably received by many distinguished British critics and had a modest commercial success.

Nothing further occurred until June, 1966, when a question was raised in the House of Commons asking the Attorney-General if he intended to prosecute the appellants. He replied in the negative. Later, one of the Members of Parliament who had raised the question in the House launched a private prosecution under s. 3 of the Act. The magistrate who heard the case ordered the forfeiture of three copies of the book which had been seized. The appellants then wrote again to the Director of Public Prosecutions informing him that in spite of the magistrate's decision they intended to continue publishing the book and intimating that they would defend any proceedings which he might feel impelled to take under s. 2. Perhaps not surprisingly, the Director did institute such proceedings. The appellants then suspended publication pending the outcome of those proceedings. By this time some thirteen thousand copies of the book had

been sold yielding a profit of about £1,200 to the appellants. The trial opened on Nov. 13, 1967, at the Central Criminal Court before JUDGE ROGERS and a jury. It lasted for nine days and on Nov. 23, 1967, the appellants were convicted. They were fined £100 and ordered to pay the costs of the prosecution to an amount not exceeding £500. They apply to this court for leave to appeal against that conviction. This court has granted leave and, by consent, treated the hearing of this application as the hearing of the appeal.

We have been told by both sides that this case is one of the greatest importance. Indeed, it has been said on behalf of the appellants that the determination of this appeal may affect the whole future of literature and the right to free speech in this country. This court does not, however, propose to express any opinion whether this book or books like it are obscene; still less, whether their publication is justified as being for the public good. These questions are not for this court to decide; they are wholly within the province of a jury. On an indictment under s. 2 (1) of the Act of 1959 it is for the jury alone—representing the body of ordinary citizens—to decide these difficult questions after having had a proper direction on the law and an adequate summing-up of the case for the Crown and for the defence. The only question for us to decide is whether the criticisms, which have been so skilfully made by counsel for the appellants, of the learned judge's direction and summing-up to the jury are justified, and if so, whether the convictions can be allowed to stand.

This court has considerable sympathy with the learned judge in the difficult task which faced him, particularly in relation to the defence under s. 4 of the Act. As far as that defence was concerned, he was without guidance from authority. There is no reported case dealing with the question, and this is certainly the first time that it has been considered by an appellate tribunal.

There are three main criticisms made in this court about the summing up: (i) that the learned judge failed to give the jury adequate directions as to the meaning of the word "obscene" as used in the Act of 1959; (ii) that the learned judge did not adequately put the case raised by the defence in answer to the allegation that the book was obscene; (iii) that the learned judge, in reality, gave the jury no guidance at all as to the meaning of s. 4 or how they should approach the defence raised under that section.

The Act of 1959, as its preamble states, was an Act to amend the law relating to the publication of obscene matter; to provide for the protection of literature; and to strengthen the law concerning pornography. It certainly reformed the law in relation to obscenity in a number of important respects. At common law it was possible to obtain a conviction by taking an isolated passage in a book out of its context and proving that it tended to "deprave and corrupt those whose minds are open to such influences and into whose hands a publication of this sort may fall"—not, be it noted, is likely to fall, but may fall (see *R. v. Hicklin* (1)). No defence was available such as is now provided by s. 4 although STABLE, J., in his celebrated summing-up in *R. v. Martin Secker Warburg, Ltd.* (2) sought to mitigate some of the rigours of the common law as laid down in the mid-Victorian era when apparently even the *Venus* in the Dulwich Gallery was regarded as obscene.

The test of obscenity is now laid down in s. 1 of the Act of 1959 which, insofar as it is material, reads as follows:

"(1) For the purposes of this Act an article shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and

(1) (1868), L.R. 3 Q.B. 360.

(2) 118 J.P. 438; [1954] 2 All E.R. 683.

corrupt persons who are likely, having regard to all relevant circumstances, to read, . . . it."

The learned judge read out this section to the jury, laying emphasis on the words "if taken as a whole". He then went on to say:

"Those other vital words 'tend to deprave and corrupt' really mean just what they say. You have heard several efforts to define them. 'Tend' obviously means 'have a tendency to' or 'be inclined to'. 'Deprave' is defined in some dictionaries, as you heard, as 'to make morally bad; to pervert or corrupt morally' . . . The essence of the matter, you may think, is moral corruption."

The appellants contend that this direction as to the meaning of obscenity does not go far enough; the learned judge should have gone on, so they say, to explain that the essence of moral corruption is to make a person behave badly or worse than he otherwise would have done, or to blur his perception of the difference between good and bad. This court cannot accept that contention. Were it sound, it would perhaps be difficult to know where the judge ought to stop. When, as here, a statute lays down the definition of a word or phrase in plain English, it is rarely necessary and often unwise for the judge to attempt to improve on or re-define the definition. Certainly, in the circumstances of the present case he cannot be blamed for saying no more than he did about the words "deprave and corrupt".

The only possible criticism that can be validly made of this part of the summing-up is that the learned judge gave no guidance to the jury on the difficult question what s. 1 meant by "persons" who were likely to read that book. Clearly this cannot mean all persons; nor can it mean any one person, for there are individuals who may be corrupted by almost anything. On the other hand, it is difficult to construe "persons" as meaning the majority of persons or the average reader, for such a construction would place great difficulties in the way of making any sense of s. 4. The legislature can hardly have contemplated that a book which tended to corrupt and deprave the average reader or the majority of those likely to read it could be justified as being for the public good on any ground. This court is of the opinion that the jury should have been directed to consider whether the effect of the book was to tend to deprave and corrupt a significant proportion of those persons likely to read it. What is a significant proportion is a matter entirely for the jury to decide. It has been persuasively argued by counsel for the appellants that, in the absence of such a direction, the jury may have thought that they were bound to hold the book obscene if they came to the conclusion that it tended to corrupt and deprave perhaps only four or five of the thirteen thousand persons who bought it. On the other hand, the jury may have thought that they could convict only if the book tended to deprave and corrupt the average reader or the majority of its readers. This court does not consider that the absence of any direction on the number of persons who might be corrupted and depraved could, by itself, vitiate the conviction.

A much more serious criticism of the summing-up is that it never put the appellants' case on obscenity to the jury. Counsel for the appellants conceded, as he had to, that the intent with which the book was written was irrelevant. However pure or noble the intent may have been, if, in fact, the book taken as a whole tended to deprave and corrupt a significant proportion of those likely to read it, it was obscene within the meaning of that word in the Act of 1959. The defence, however, was that the book had no such tendency; it gave a graphic description of the depths of depravity and degradation in which life was lived in Brooklyn. This description was compassionate and condemnatory.

The only effect that it would produce in any but a minute lunatic fringe of readers would be horror, revulsion and pity; it was admittedly and intentionally disgusting, shocking and outrageous; it made the reader share in the horror it described and thereby so disgusted, shocked and outraged him that, being aware of the truth, he would do what he could to eradicate those evils and the conditions of modern society which so callously allowed them to exist. In short, according to the defence, instead of tending to encourage anyone to homosexuality, drug-taking or senseless, brutal violence, it would have precisely the reverse effect. Unfortunately, whilst the learned judge told the jury in general terms that it was not enough for the Crown to prove merely that the book tended to horrify, shock, disgust or nauseate, he never put a word of the specific defence to the jury when he summed up on the issue of obscenity.

This is a serious defect in the summing-up which is conceded by counsel, who has conducted this appeal for the Crown with characteristic ability and fairness. He argues, however, that this defect was cured because when the learned judge came to deal with the defence of public good under s. 4, the matters raised by the defence on obscenity were touched on in the short précis which he then gave the jury of the evidence of the thirty witnesses called for the appellants in support of that defence. Attractively though counsel put this argument, this court is unable to accept it. The learned judge rightly made it quite plain to the jury that so far as the issue of obscenity was concerned everything depended on the view which they took of the book after reading it. He said that on that issue "the opinion of experts or alleged experts—or the opinion of a magistrate for that matter—do not concern you in the least". After the jury had been out for nearly 3½ hours, they returned to court and asked the following question: "Do we have to arrive at a decision on part 1, the test of obscenity, before we can pass on to discussing part 2, defence of public good?" The learned judge told them that the answer to that question was an emphatic "yes" and that it was only if and when they were convinced that the book was obscene that they should pass on to consider the second point.

No doubt in very special circumstances (which do not exist here) expert opinion on the issue of obscenity may be admissible (see *Director of Public Prosecutions v. A. & B. C. Chewing Gum, Ltd.* (1)). In the present case, however, the jury were rightly told by the learned judge to consider the issue of obscenity by itself and decide on the tendency of the book without reference to the evidence of the expert witnesses. In these circumstances the failure to put the appellants' case on obscenity and to tell the jury what the appellants alleged the tendency of the book to be can hardly be cured by what was said in the summing-up in relation to the evidence called on the defence of public good. With a book such as this, in which words appear on almost every page and many incidents are described in graphic detail which, in the ordinary, colloquial sense of the word, anyone would rightly describe as obscene, it is perhaps of particular importance to explain to the jury what the appellants allege to be the true effect of those words and descriptions within their context in the book. It is true that, however impeccably the learned judge might have summed-up, the appellants' defence on the issue of obscenity, clearly the jury might well have rejected it. Indeed it is possible to take the view that they would probably have done so but not, in the opinion of this court, that they would without doubt have done so. After all, they were out for nearly 5½ hours in all.

The appellants' case in this court does not, however, rest only on the failure in the summing-up to put their defence on obscenity before the jury. They say

(1) 131 J.P. 373; [1967] 2 All E.R. 504; [1968] 1 Q.B. 159.

that the jury received no help at all in the summing-up on how they should approach their very difficult task in considering the defence under s. 4 of the Act of 1959. That section insofar as it is relevant reads as follows:

- "(1) A person shall not be convicted of an offence against section two of this Act, . . . if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. (2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or negative the said ground."

The onus was clearly on the appellants to make out their defence under this section on a balance of probabilities.

Some criticism of the learned judge, which this court regards to be without foundation, was made in relation to his ruling that the appellants' witnesses on this defence should be heard first and the Crown's witnesses only in rebuttal. This court considers that the course adopted by the learned judge was entirely appropriate. Normally the Crown cannot know in advance on which of the many grounds referred to in s. 4 the defendant intends to rely. If it were always for the Crown to begin on this issue, there would be many cases in which ordinary caution would require a great deal of time and money to be spent in adducing evidence to meet a case which it turns out the defendants never intended to make. No doubt circumstances vary and the judge has a discretion in the matter. This court is satisfied that no valid criticism can be made of the way in which the learned judge exercised his discretion in the circumstances of this case.

The defence of public good under s. 4 does, however, require to be carefully explained to the jury. The jury may have great difficulty in reconciling that section with s. 1 and s. 2 of the Act of 1959. The jury does not have to consider the defence under s. 4 until it has come to the conclusion that the book is obscene in the sense that, taken as a whole, its effect is to tend to corrupt and deprave persons likely to read it. The jury may not understand how it is possible that if a book has such a tendency it can be justified on any ground as being for the public good. With no explanation as to the true meaning of s. 4, the jury may well be left in the same state of perplexity as that evinced in the letter of Jan. 14, 1966, from the Director of Public Prosecution's deputy, to which reference has been made in this judgment. As already indicated, the learned judge was faced with a most difficult task, with no authority to help him. No one could blame him if such guidance as he might have given them turned out to be inadequate. He did not, however, give them any guidance at all, beyond telling them that if they were satisfied on the balance of probabilities that the book was published justifiably for the public good on account of its literary, sociological or ethical merits, they should return a verdict of not guilty. In effect he threw them in at the deep end of s. 4 and left them to sink or swim in its dark waters.

In the view of this court, the proper direction on a defence under s. 4 in a case such as the present is that the jury must consider on the one hand the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary, sociological or ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good. A book may be worthless; a book may have slight but real merit; it may be a work of genius. Between those extremes the gradations are almost infinite. A book

may tend to deprave and corrupt a significant, but comparatively small, number of its readers or a large number or indeed the majority of its readers. The tendency to deprave and corrupt may be strong or slight. The depravity and corruption may also take various forms. It may be to induce erotic desires of a heterosexual kind or to promote homosexuality or other sexual perversions or drug-taking or brutal violence. All these are matters for the jury to consider and weigh up; it is for them to decide in the light of the importance they attach to these factors whether or not the publication is for the public good. The jury must set the standards of what is acceptable, of what is for the public good in the age in which we live. No doubt if a direction along these lines had been given to the jury they might well have concluded that in all the circumstances no defence had been made out under s 4. Such a conclusion would then have been unassailable in this court.

It is conceded by the Crown that a direction along these lines should have been but was not given to the jury in the present case. It is argued that this defect in the summing-up is cured or at any rate made of little importance because the judge told the jury in general terms to consider whether the publication was justified as being for the public good. This court cannot accept that argument. It is impossible for this court to conclude that even if a proper direction had been given on s. 4 the jury would without doubt have rejected the defence under that section. In the view of this court, the absence of a proper direction under s. 4, taken together with the failure to put the case for the defence on obscenity, constitute fatal flaws in the summing-up. It is impossible for this court to be satisfied that these have caused no miscarriage of justice. Therefore there can be no question of applying the proviso and indeed the Crown has not argued that the proviso should be applied. The appeal must accordingly be allowed.

Conviction quashed.

Solicitors: *Goodman, Derrick & Co.; Director of Public Prosecutions.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND BRIDGE, JJ.)

July 31, 1968

R. v. RUSSELL. Ex parte BEAVERBROOK NEWSPAPERS, LTD. AND ANOTHER

Magistrates—Committal proceedings—Reports—Publicity—Order lifting restrictions on reports—Order to apply to totality of proceedings—Criminal Justice Act, 1967 (c. 80), s. 3 (2).

An order made under s. 3 (2) of the Criminal Justice Act, 1967, that the restriction imposed by s. 3 (1) on publication of reports of committal proceedings should not apply to particular proceedings must apply to the total of those proceedings.

MOTION FOR MANDAMUS AND CERTIORARI by Beaverbrook Newspapers, Ltd., and Derek John Marks, editor of the *Daily Express* newspaper, for an order of mandamus directed to the metropolitan stipendiary magistrate at Old Street Magistrates' Court directing him to order that s. 3 (1) of the Criminal Justice Act, 1967 (prohibiting reports of committal proceedings) should not apply to reports of committal proceedings then being heard against Christopher Michael Swan, David Gordon, Mary Rood, John Joseph White and Stephen John Hartford. Alternatively, the applicants sought an order of certiorari to remove into the High Court to be quashed that part of an order made by the magistrate that s. 3 (1) of the Act of 1967 should not apply to the committal proceedings only in respect of any report of that part of the committal proceedings which related to David Gordon. The grounds for the applications were that (i) the committal proceedings were against all the accused; (ii) counsel for David Gordon had applied under s. 3 (2) of the Criminal Justice Act, 1967, that the restrictions on reports of the proceedings should not apply to reports of those proceedings; (iii) the magistrate refused and/or failed to make an order as he was bound so to do; (iv) alternatively, the magistrate purported to make an order that s. 3 (1) should not apply to reports only of that part of the committal proceedings which related to David Gordon.

Sir Peter Rawlinson, Q.C., and B. H. Anns for the applicants.

H. J. Leonard for the Director of Public Prosecutions.

C. J. J. D. Hart for Christopher Michael Swan.

N. Purnell for Stephen John Hartford.

J. Thomas for David Gordon.

F. P. Shier for Mary Rood.

The magistrate and John Joseph White did not appear.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the applicants, Beaverbrook Newspapers, Ltd., for an order of certiorari to quash an order made by the metropolitan stipendiary magistrate at Old Street Magistrates' Court in committal proceedings before him freeing in a limited manner, the committal proceedings, from the restrictions imposed by s. 3 of the Criminal Justice Act, 1967. In addition, he applies for an order of mandamus to the magistrate to make an order which frees the whole of the committal proceedings, not merely part of them, from those restrictions.

The matter arises in this way: there are before the learned magistrate committal proceedings involving some five accused. There are over forty charges; quite generally twenty-nine of them relate either to the delivery of, or the possession of, or conspiracy to obtain, drugs; four involve violence including attempted murder; a conspiracy to cause grievous bodily harm; and one, at any rate,

relating to conspiracy to procure abortions. At first sight it is difficult to see the connexion, but at any rate in respect of all the charges, other than possibly the conspiracy to procure abortions, the charges revolve round one of these accused, Dr. Swan.

The prosecution thought it right, having regard to this inter-relation and to the fact that each witness would speak to more than one of these charges, that there should be one set of committal proceedings, and in due course they commenced before the learned magistrate. At the outset counsel for one of the accused, David Gordon, applied for an order under s. 3 (2) of the Act. That section provides by sub-s. (1) and sub-s. (2):

"(1) Except as provided by sub-sections (2) and (3) of this section, it shall not be lawful to publish in Great Britain a written report, or to broadcast in Great Britain a report, of any committal proceedings in England and Wales containing any matter other than that permitted by sub-section (4) of this section.

"(2) A magistrates' court shall, on an application for the purpose made with reference to any committal proceedings by the defendant or one of the defendants, as the case may be, order that the foregoing subsection shall not apply to reports of those proceedings."

As I have said, application was made on behalf of one only of the accused, namely David Gordon, for such an order. The magistrate in an affidavit which he has put in in these proceedings states:

"I made an order as asked in respect of the proceedings against David Gordon, but ruled that only those parts of the proceedings that related to charges concerning the said David Gordon might be reported."

One can well see how the magistrate came to make the order in that form; in fact the accused Gordon was only involved in six out of all these charges, and four of those related to drugs involving others, one conspiracy with others to cause grievous bodily harm, and alone for attempted murder. If the whole of the committal proceedings were freed from restrictions, it would result in publicity being given in respect of the other accused, some of whom were being tried for offences quite different from those with which the accused Gordon was involved. As I have said, the magistrate clearly had that in mind, and in his affidavit he goes on to say that he realised the others might well be prejudiced if the whole of the committal proceedings were freed from restriction. He emphasised that by saying what this court understands to be the truth, that these charges were so interconnected that it would involve prejudice; and finally he said they were so interconnected that it was quite proper that there should be one set of committal proceedings and not separate committal proceedings.

While I have every sympathy with the learned magistrate, I am quite satisfied in my own mind that the order he made was an order which could not be made under the section. It has, I think, long been realised that difficulties such as this would be bound to arise in the application of s. 3; but Parliament, despite that, has at any rate not expressly permitted what the magistrate has done in the present case, and if one looks at the section as a whole it is quite clear that there is no jurisdiction to make such an order.

Take the simple case of two or more accused being tried jointly on a single charge. It is clear beyond argument then that if one of them elects for full publicity, that must apply to his co-accused on that charge. Similarly, when one gets not merely a multiplicity of accused but a multiplicity of charges, if they are so interconnected as to be properly the subject of one set of committal proceedings, then as it seems to me it is quite clear that an order under sub-s. (2)

must apply to the totality of the proceedings. The court has been referred to later provisions in s. 3 (3) and (4) which support this view. For my part I find it unnecessary to refer to them; it seems to me that the matter is clear beyond peradventure.

A matter which has concerned me more is whether Beaverbrook Newspapers, Ltd. the applicants, have a standing to apply for this order. I have however come to the conclusion that they have, whether it is for an order of certiorari or for an order of mandamus. So far as certiorari is concerned, the matter is really perfectly clear. They are certainly a person aggrieved so as to be able to make this application. So far as mandamus is concerned, the test may well be stricter, and it may well be that the applicants have to show that they have what has been described in one case at any rate as a specific legal right; but in my judgment they have. On the true construction of sub-s. (2) they were entitled to have an order giving full publicity to all the proceedings. If they choose to exercise that right while this order is in force, then they run the risk of incurring penalties under s. 3 (5). In those circumstances it seems to me that they qualified as an applicant for an order of mandamus. Accordingly, in my judgment there should be an order of certiorari to quash the limited form of order made and an order of mandamus to the magistrate to make the necessary order under s. 3 (2) freeing the whole of the committal proceedings from the restrictions imposed by the section.

MELFORD STEVENSON, J.: I agree.

BRIDGE, J.: I agree.

Certiorari and mandamus granted.

Solicitors: *Allen & Overy; Director of Public Prosecutions; W. J. Fraser & Son; Clifford Watts, Compton & Co.; Montague, Gardner & Howard; T. J. James & Co.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(PAULL AND PHILLIMORE, JJ.)

July 22, 1968

Re MELTON MOWBRAY (EGERTON WARD) U.D.C. ELECTION

Local Government—Election—Urban district councillor—Nomination—Signature of elector to nomination paper—Usual signature—Signature not corresponding to form of elector's name in electoral register—Urban District Council Election Rules, 1951 (S.I. 1951 No. 267), Sch. 1, r. 9 (2), Appendix.

The signature of an elector who subscribes the nomination paper of a candidate for election as an urban district councillor is, as required by the Urban District Council Election Rules, 1951, his usual signature, and it is immaterial that this signature does not correspond with the form in which the elector's name is shown in the electoral register.

SPECIAL CASE STATED under s. 126 of the Representation of the People Act, 1949.

On May 11, 1968, a local government election was held for the Egerton Ward in the urban district of Melton Mowbray. A nomination paper in the prescribed form nominating the petitioner, James Alfred Stewart Dixon, as a candidate for the said election, was delivered in due time to the respondent, William Eric Brown, who was the returning officer for the said election. The nomination paper was subscribed by a proposer and a seconder, and by eight other persons as assenting to the nomination. Among the eight assenting persons was one whose signature and electoral number appeared thus on the nomination paper: Signature: "E. Marment" and the electoral number "B. 632". In the electoral register for the urban district, the name appearing as entered against the number B. 632 was "Marment, Nellie". The returning officer held that the said nomination paper was invalid for the following reason: "That the particulars of a person subscribing the nomination paper are not as required by law." The returning officer's ground for so holding was that one Ellen Marment, a married woman, of 22, Greaves Avenue, Melton Mowbray, Leicestershire, being shown on the electoral register as "Marment, Nellie", had subscribed the nomination paper as "E. Marment". Ellen Marment who subscribed the nomination paper was duly qualified as an elector for the urban district. She was entered in the electoral register against the number B. 632 under the name "Marment, Nellie", this being the name by which she was commonly known, in the sense that Marment was her married name and she had always been addressed as "Nellie" by her parents, her friends and her work-mates. Since her marriage Mrs. Marment had always signed all cheques on her bank account, her insurance papers and any other documents required at her work or elsewhere "E. Marment". The question for the court was whether the respondent, William Eric Brown, was right in holding the nomination paper invalid.

D. G. Widdicombe, Q.C., and *David Trustring Eve* for the petitioner, the candidate for election.

P. Freeman for the respondent, the returning officer.

I. O. Griffiths for the Director of Public Prosecutions.

PAULL, J., having read the relevant facts and the question for the decision of the court from the Special Case, continued:] In considering this matter, one has to consider what precisely is the law with regard to the question of persons subscribing a nomination paper. One can, I think, go direct to the Urban District Council Election Rules, 1951. If one goes to these Rules, Sch. 1, r. 5, states:

"(1) Each candidate shall be nominated by a separate nomination paper in the form in the Appendix . . .". Now, if one looks at the form in the appendix, one sees that so far as the candidate himself is concerned, he has to state first of all his surname, then his other names in full, then his place of residence and then his description. He is not required to sign the nomination paper in any way. He has to give these particulars. Under the spaces in which he has to fill in these particulars, there are two columns, one is headed "Signature" and the second column is headed "Electoral Number". Under "Signature" is first of all "Proposer" and space for him to fill in his signature and then his number, and then "Seconder" with similar spaces. Then under those two lines comes the statement "We, the undersigned, being local government electors for the said ward do hereby assent to the foregoing nomination". Then there is a space for their signatures and then there is the usual space for their electoral numbers to be put in.

The word "signature" has been referred to from time to time in cases with regard to elections, and in *Bowden v. Besley* (1), where the question of the names and the signatures arose, MANISTY, J., said this:

"Then we come to the form of nomination paper given in Sch. 8. That form complies with the requirements of Sch. 3, for it contains one column for the surname and a separate column for the other names of the candidate himself; but as regards the nominators and assentors, there is one column only, which is headed 'Signature', and in which the initials 'A.B.', etc. are inserted. Those initials, in my judgment, merely represent the ordinary signature of the nominating or assenting burgess, and I think that it was the intention of the legislature to draw a distinction between the candidate on the one hand and his nominators or assentors on the other."

In other words, so far as nominators and assentors are concerned, what is required is not their full names or the names on the electoral roll, it is the usual signatures of the persons who either propose, second or assent. That is borne out if one looks a little further in the Urban District Council Election Rules, 1951, because Sch. 1, r. 6, provides:

"(1) The nomination paper shall be subscribed by two electors . . . as proposer and seconder and by eight other electors for that area as assenting to the nomination."

So that there should be no doubt as to what is meant by the word "subscribe", r. 6 (2) states that where a nomination paper bears the signature of more than the required number of persons, certain consequences shall follow.

The only other rule to which I think I need refer is Sch. 1, r. 9. Rule 9 is under the heading "Decisions as to validity of nomination papers". Rule 9 provides:

"(1) Where a nomination paper and the candidate's consent thereto are delivered in accordance with these rules, the candidate shall be deemed to stand nominated unless and until the returning officer decides that the nomination paper is invalid, or proof is given to the satisfaction of the returning officer of the candidate's death, or the candidate withdraws. (2) The returning officer shall be entitled to hold a nomination paper invalid only on one of the following grounds, that is to say:—(a) that the particulars of the candidate or the persons subscribing the paper are not as required by law . . ."

It is clear that what is required by law is the usual signature of the proposer, seconder and the assentors. Of course, as soon as one realises this, one realises

that various problems may arise for the returning officer to solve, and the problems may not be easy. One can give examples almost indefinitely. We have had handed to us for instance a page of the OXFORD DICTIONARY OF CHRISTIAN NAMES in order to prove that the word "Nelly" is the pet form of Ellen. One only has to look at that page to see other examples: "Ned" see "Edward", "Nessie" is the Welsh diminutive for Agnes, "Netta" is the diminutive for Janet. If, for example, using a common surname "Smith", one has someone whose real name is Edward Smith and who is entered on the electoral roll as Edward Smith but who has all his life been known as Ned, and has always signed all the papers he has to sign, his bank account and any other papers, by the initial "N.", standing for Ned, he may sign as an assessor "N. Smith", and if he does not sign the nomination paper "N. Smith", he is not signing by his usual signature, he is signing by an unusual signature. Exactly the same would apply with "Agnes" known as "Nessie" or it could be "Janet" known as "Netta". To take the example in this case, one has a case where a woman who is a married woman, is entered on the roll by the name of "Nellie". Now we know that her husband entered that name on the roll. He entered it because she is always known at home by the name of Nellie, but her usual signature is "E.", it is "E. Marment", "E." standing for Ellen, for her real name is Ellen, but all her life she has been called Nellie.

So we have here a very good example of a case where the signature does not necessarily show to the returning officer at first glance that the person who has signed is in fact the person on the electoral roll. Of course, one of the questions which have been canvassed before us is "Well, what is the returning officer to do? Do the rules mean that he must exercise his discretion to the best of his ability and that, provided he comes to a conclusion honestly, that is sufficient and his decision thereupon is valid and binding?" Well now, as for that contention, that is not what the rule says, for the returning officer, by the rule, is only entitled to hold a nomination paper invalid if it is not "the signature". Indeed, technically if in this case Mrs. Marment had signed "N. Marment", and it could be proved that this is the only occasion in her life in which she had signed "N. Marment" and not "E. Marment", it might be contrary to the law, for it would not be her usual signature, which is what is required if MANISTY, J., be right.

It is said "Well, look at the difficulty that places the returning officer in, what is he to do?". We have asked counsel and there is no authority to suggest that he merely has to look at the form with which he is presented. He has the opportunity to make such enquiries as he may think right. He is given at least twenty-four hours in which to do so. One enquiry which springs to mind at once is to get on the telephone to the agent, and ask the agent to satisfy him that "E. Marment" is in fact "N. Marment". Indeed with this form there might be several such queries. For instance, the proposer on the electoral roll is Ronald Woods, but the signature is "R. L. Woods", and by no means does it follow that "R. L." is Ronald. In many families the father's name may be one name, the son's may be the same so far as the first name is concerned, but another name made be added. So it does not follow that "R. L. Woods" is in fact Ronald, it might be the son.

All these matters are matters which have been thrown on the shoulders of the returning officer by the Representation of the People Act, 1949, and by the rules made under that Act of Parliament. It cannot always be easy for him to fulfil his duties and be sure of being one hundred per cent. accurate when he does so fulfil his duties. The rules have said, however, that, provided it is the usual signature, he is not entitled to reject the nomination, and in this case it is perfectly clear that this signature was the usual signature of the

person who is "Marment, Nellie" on the roll. That being so, in our judgment, it was not open for the returning officer to declare the nomination paper invalid. He has declared it invalid, and we are asked in the Case to answer the simple question whether the respondent was right in holding the said nomination paper invalid. He was clearly wrong.

PHILLIMORE, J.: I agree. The returning officer rejected this nomination paper on the ground that the signature of one of the persons who signed this paper assenting to the nomination was not as required by law. Looking at the Urban District Council Election Rules, 1951, it is perfectly clear that anyone who signs as assenting to a nomination paper must in the first place be an elector, and then must actually sign the paper, and third, it follows from the form contained in the rules that the appropriate electoral registration number applicable to that individual must appear against his or her name on the paper. It is now conceded that Mrs. Marment when she signed this nomination paper, was an elector. It is also conceded that the signature "E. Marment" was her ordinary signature, and it is not disputed that the number B. 632 which appeared against her signature on the nomination paper was the number which applied to her according to the electoral roll on which she was described as "Marment, Nellie", that being the name by which she was normally called and the description in fact ascribed to her by her husband when he signed the appropriate form. Accordingly the requirements of the law, in so far as her signature to this paper were concerned, were all fulfilled according to the rules. The returning officer rejected the nomination relying on r. 9 (2) of the rules in Sch. 1. The returning officer could only hold this paper invalid, if it were not subscribed as was required. That particular sub-rule is the one which he relied on; he has to give the grounds on which he has acted on the paper itself and he expressly referred to Sch. 1, r. 9 (2). He was, putting it quite shortly, wrong. It was subscribed as required by law. It follows that this nomination paper was wrongly rejected, and the question for this court must be answered in the manner that PAULL, J., has stated.

[At the request of counsel for the petitioner, and with the consent of counsel for the respondent, the court then gave leave for the Special Case Stated to be amended so as to enable the court to declare that, in view of the wrongful rejection of the petitioner's nomination paper, the election which was held was void.]

Declarations accordingly.

Solicitors: *Penningtons and Lewis & Lewis, for Freer, Bouskell & Co., Leicester; Sharpe, Pritchard & Co.; Director of Public Prosecutions.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND FENTON ATKINSON, L.J.J. AND WALLER, J.)

July 25, 30, 1968

R. v. STAFFORD. R. v. LUVAGLIO

Criminal Law—Appeal—Fresh evidence—“Evidence likely to be credible”—Evidence well capable of belief—Criminal Appeal Act, 1966 (c. 31), s. 5.

The phrase “evidence . . . likely to be credible” in s. 5 of the Criminal Appeal Act, 1966 (replaced by s. 23 of the Criminal Appeal Act, 1968), which deals with the admission of fresh evidence on appeal, means evidence well worthy of belief. A more liberal attitude with regard to the reception of fresh evidence than had hitherto prevailed was introduced by s. 5 of the Act of 1966.

APPLICATIONS by Dennis Stafford and Michael Luvaglio for leave to call additional evidence and to appeal against their convictions at Newcastle Assizes of the murder of one Angus Sibbett. The court refused the applications both for leave to appeal against the convictions and for leave to call further evidence.

R. Lyons, Q.C., W. R. Steer and R. A. R. Stroyan for the applicant Stafford.

J. P. Comyn, Q.C. and J. C. Mathew for the applicant Luvaglio.

H. C. Scott, Q.C. and R. Castle-Miller for the Crown.

Cur. adv. vult.

July 30. EDMUND DAVIES, L.J., read the judgment of the court, in which after stating the nature of the applications and the facts he continued: O’CONNOR, J., when directing the jury on the standard of proof, told them to “remember that a reasonable doubt is one for which you could give reasons if you were asked”. We dislike such a description or definition. Nevertheless, this topic was clearly and accurately expounded, and the jury cannot have had any doubt as to the proper standard of proof which had to be attained by the prosecution before they could convict.

[HIS LORDSHIP then said that wholly circumstantial though the evidence was and although no motive to commit the crime charged was proved against either applicant, the court had no doubt that the verdict was entirely justified by the evidence adduced and could not (in the light of that evidence) be regarded as unsafe and unsatisfactory. HIS LORDSHIP continued:] It therefore remains to deal with the applications made by both applicants for leave to call further evidence. Section 5 of the Criminal Appeal Act 1966, provides that:

“Without prejudice to the generality of section 9 of the [Criminal Appeal] Act, 1907 (supplemental powers), where evidence is tendered to the Court of Appeal under that section, the court shall, unless they are satisfied that the evidence if received would not afford any ground for allowing the appeal, exercise their power under that section of receiving it if—(a) it appears to them that the evidence is likely to be credible and would have been admissible at the trial on an issue which is the subject of the appeal; and (b) they are satisfied that it was not adduced at the trial, but that there is a reasonable explanation for the failure so to adduce it.”

We interpret the phrase “evidence . . . likely to be credible” in the same way as the phrase “credible evidence” was interpreted before the Act of 1966 in *R. v. Parks* (1), that is, as meaning evidence well capable of belief. It is clear that a more liberal attitude than hitherto prevailed was introduced by the provision in s. 5 that the fresh evidence sought to be introduced *shall* be received unless the court

(1) [1961] 3 All E.R. 633.

is satisfied, on the grounds specified in the section, that it ought not to be. Nevertheless, public mischief would ensue and legal process could become indefinitely prolonged were it the case that evidence produced at any time will generally be admitted by this court when verdicts are being reviewed. There must be some curbs, the section specifies them, and we proceed to consider the present applications with due regard to them.

[His LORDSHIP then dealt with the numerous witnesses whom the applicants sought to call, briefly summarised the evidence that they would give and stated that the court refused the applicants leave to adduce any of the further evidence; and having regard to the convincing nature of the evidence adduced at the trial, it was fully brought home that the applicants were parties to the murder of Sibbett. The jury arrived at the only possible verdicts in relation to the applicants and their application for leave to appeal would, accordingly, be refused.]

Applications dismissed.

Solicitors: *John Marron, Mellon & Co.*, Jarrow; *S. H. Mincoff & Science*, Newcastle-upon-Tyne; *Director of Public Prosecutions*.

T.R.F.B.

QUEEN'S BENCH DIVISION

(EDMUND DAVIES, THOMPSON AND WALLER, JJ.)

August 20, 21, 1968

R. v. EAST GRINSTEAD JUSTICES. Ex Parte DOEVE

Alien—Breach of landing condition—Power to order defendant to enter into recognisance to leave United Kingdom—Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), s. 1 (2)—Aliens Order, 1953 (S.I. 1953 No. 1671), art. 26 (2).

By the Aliens Restriction Act, 1914, s. 1 (2), a person who fails to comply with any provision of the subsection [now reproduced by art. 26 (1) of the Aliens Order, 1953] is liable on conviction to a fine or imprisonment, and, in addition, the court before which he is convicted may require him to enter into recognisances to comply with the provisions of the Order.

On Aug. 5, 1968, the applicant pleaded guilty to a charge of "being an alien, namely a Dutch citizen, who having attained the age of sixteen years and in whose case there was in force a landing condition requiring [him] to leave the United Kingdom by midnight on July 18, 1968, did fail to comply with this condition, and on July 25, 1968, was unlawfully at large in the United Kingdom, contrary to art. 1 (1), art. 5 (5) and art. 25 (1) of the Aliens Order, 1953". The justices fined him £20 and ordered him to enter into a recognisance to leave the United Kingdom within seven days. Subsequently the applicant's passport was endorsed by the Home Office extending his period of stay in the United Kingdom till Aug. 12, 1968. An application for a further extension was still under consideration.

HELD: the Order of 1953 did not contain any provision requiring an alien who had committed an offence against the Order to leave the United Kingdom, and, accordingly, the justices had no power to order the applicant to enter into the recognisance, and certiorari must issue to quash that part of their determination.

MOTION for an order of certiorari to bring up and quash that part of a sentence imposed by East Grinstead magistrates whereby they ordered the applicant, Evert Doeve, a Dutch national, to enter into a recognisance in the sum of £100 to leave the United Kingdom within seven days. The applicant had pleaded guilty to failing to comply with a landing condition requiring him to leave the United

Kingdom by midnight on July 18, 1968, contrary to art. 1 (1), art. 5 (5) and art. 25 (1) of the Aliens Order, 1953.

P. R. Pain, Q.C., and S. J. Burnton for the applicant.

J. L. E. MacManus for the respondent, Chief Inspector Marshall of the Sussex Constabulary.

The Home Secretary and the East Grinstead Justices did not appear.

Aug. 21. The following judgments were read.

EDMUND DAVIES, L.J.: In these proceedings, counsel moves on behalf of the applicant, Mr. Evert Doeve, for an order of certiorari to bring up and quash part of a sentence imposed on him by the justices for the petty sessional division of East Grinstead, Hailsham and Uckfield, on Aug. 5, 1968, for his admitted contravention of the Aliens Order, 1953 (1). The sole question which arises for determination is whether the justices were entitled to require him, as they did, to enter into a recognisance to leave the United Kingdom by Aug. 12, 1968. Counsel for the applicant has observed that the answer to that question has an importance extending far beyond the present case. What is said is that the applicant is a minister of the Church of Scientology, and that, as the government has embarked on a general campaign against scientologists, our decision in the present case may well have a bearing on many others. This court knows nothing of the cult of scientology, is unaffected by any government campaign, and is concerned only to decide the question which arises in the instant case, regardless of what may be the consequences of that decision.

The undisputed facts are these. The applicant was a Netherlands citizen; on Jan. 13, 1966, he lawfully entered this country, his declared object in coming here being expressed to be that of attending a course of study at an institution described as the College of Scientology at East Grinstead. When he was permitted to enter this country in the first place, his passport was then stamped with a condition requiring him not to remain here longer than one month; but, as his studies at the College of Scientology lasted longer than a month, he applied to the Home Office for, and obtained, variations of the original condition which enabled him lawfully to remain here. The second of those variations limited his sojourn to Feb. 13, 1967, but by that date, he still not having completed his studies at the college, he applied for a further extension, and, while his application was being considered by the Home Office, they retained his passport. Many months then elapsed without anything happening, and, even as late as July, 1968, no Home Office decision had been communicated to the applicant. By July, 1968, he had become a minister of the Church of Scientology, and it was then decided that he should go on a mission to the United States of America. He accordingly, on July 17, 1968, went to the Home Office to retrieve his passport, intending to leave for the United States of America as soon as possible. On arriving at the Home Office, he told an official there that he was proposing to leave the United Kingdom on the following day, and his passport was returned to him with a variation of the condition requiring him to remain here not later than July 18, that is to say the next day. When the applicant saw that that condition had been stamped on his passport, he told the official that there was a possibility that he would not be able to leave until a week or so after July 19. He was then informed that he would not get into trouble if he left the United Kingdom a few days after July 18, and with that assurance he left the Home Office. Thereupon he unsuccessfully applied to the American embassy for a visa to visit that country. He returned to the college, and on Monday, July 22, 1968, he handed

his passport to a lady known there as the personnel control officer so that she could make an application on his behalf to the Home Office for a further variation of the condition to enable him to remain lawfully here for an extended period. He later learned from that lady that she had, by an oversight, forgotten to make the application, and on July 25 he was arrested and charged with an offence in these words:

"Charged for that you, on July 25, 1968, at East Grinstead in the county of East Sussex, being an alien, namely a Dutch citizen, who, having attained the age of sixteen years and in whose case there was in force a landing condition requiring you to leave the United Kingdom by midnight on July 18, 1968, did fail to comply with this condition and on the said July 25, 1968, was unlawfully at large in the United Kingdom, contrary to art. 1 (1), art. 5 (5) and art. 25 (1) of the Aliens Order, 1953 as amended."

It was on Aug. 5, 1968, that the applicant appeared before the magistrates at East Grinstead to answer that charge, to which he then pleaded guilty. In explaining the facts of the case to the justices, it appears that the prosecuting police officer said that the police accepted that before he had been arrested on July 25, 1968, the applicant had in fact handed his passport to the personnel control officer at the College of Scientology to make the application for an extension, and that, by an oversight, she had omitted to do so. Counsel appearing for the applicant then made a plea in mitigation to the justices, who, having heard it, retired to consider their sentence. When they returned into court, the chairman of the bench told the applicant that they were ordering him to enter into a recognisance in the sum of £100 to leave the United Kingdom within seven days, and added that, as the applicant declined to enter into such a recognisance, a term of imprisonment would be imposed. The applicant, assuming, as did his legal adviser, that the justices had power to order him to enter into a recognisance with the threat of imprisonment on his failing to do so, thereupon did enter into such recognisance. In addition, he was fined the sum of £20. Following on his conviction, the Sussex constabulary forwarded the applicant's passport to the Home Office, who returned it with an endorsement extending his stay in the United Kingdom until Aug. 12, 1968; but we are also told, and he has said, that, on Aug. 8, the applicant applied for a further extension, and that the Home Office decision relating to that application has not yet been made known.

In empowering the Crown by Order in Council to impose restrictions on aliens, s. 1 (1) of the Aliens Restriction Act, 1914, enacted that "... provision may be made by the Order" in relation to a large variety of topics. For example, aliens may be prohibited from landing here at all, or subject only to restrictions or conditions; or they may be required to reside or remain within certain places or districts. Two paragraphs of s. 1 (1) call for special mention. By virtue of para. (c), provision may be made "for the deportation of aliens from the United Kingdom", and by para. (f),

"for requiring aliens residing in the United Kingdom to comply with such provisions as to registration, change of abode, travelling, or otherwise as may be made by the Order . . ."

Section 1 (2) of the Act of 1914 provides that:

"If any person acts in contravention of, or fails to comply with, any provisions of any such Order, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding one hundred pounds or to imprisonment . . . for a term not exceeding six months, and the court

before which he is convicted may, either in addition to, or in lieu of, any such punishment, require that person to enter into recognisances with or without sureties to comply with the provisions of the Order in Council or such provisions thereof as the court may direct. If any person fails to comply with an order of the court requiring him to enter into recognisances the court, or any court of summary jurisdiction sitting for the same place, may order him to be imprisoned . . . for any term not exceeding six months."

It was pursuant to the Act of 1914, as amended, that the Aliens Order, 1953, was made. That the applicant was, on July 25, 1968, in this country in contravention of the order was rightly undisputed. Being a Dutch citizen, art. 1 (1) prohibited him from landing here without the leave of an immigration officer. Article 5 (1) enabled that officer to give notice that leave to land was granted subject to "landing conditions" which, under art. 5 (3) could be varied from time to time by the Home Secretary. Article 5 (5) provides that, where any landing condition limits the period during which the alien may remain in the United Kingdom,

" . . . he shall be deemed to contravene that condition if he is found in the United Kingdom at any time after the expiration of that period . . . "

Finally, art. 25 (1) provides that:

" If any person acts in contravention of, or fails to comply with, any provision of this Order or of any Order made or conditions imposed or directions given thereunder, he shall be guilty of an offence against this Order."

An offence against the order having clearly and admittedly been committed by reason of the applicant's failure to comply with the landing condition as varied, imposed by virtue of the order, what were the powers of the East Grinstead justices on Aug. 5, 1968? The answer to that question lies in art. 26 (1) which adopts the wording of the main part of s. 1 (2) of the Act of 1914, which I have already quoted. Article 26 (2) then goes on to provide that:

" If any person fails to comply with an order of a court requiring him to enter into recognisances under para. (1) of this Article, that court . . . may commit him to prison for a term not exceeding six months."

It is to be observed that, under art. 26 (1), an offender may be required to enter into a recognisance to comply with, and only with, "the provisions of this Order or such provisions thereof as the court may direct". It was in purported exercise of this power that the East Grinstead justices acted.

The crux of the matter is, therefore, this: granted that the applicant was here on July 25, 1968, in breach of his landing condition, does the order of 1953 contain any provision requiring him to leave the United Kingdom? If it does, then we understand it to be conceded by the applicant that he was lawfully required to enter into the recognisance. If, on the other hand, it contains no such provision, it is conceded by counsel for the respondent that the justices had no power to call on him so to do. I cannot refrain from making the comment that the attempt to justify the action of the justices has been both solitary and faint-hearted. The Sussex police authorities alone appear to support it, and the submission advanced on their behalf can, I believe, be fairly and adequately summarised as amounting to no more than this:

" We were motivated by no antagonism to scientology. We acted solely out of consideration for the applicant, who had pleaded guilty to a contravention of the Aliens Order, by providing a means whereby he could avoid being

sent to prison or forcibly deported. What we did was, in essence, nothing more than we could have done under our common law power to bind over to come up for judgment."

Neither the Home Secretary nor the East Grinstead justices have been represented before us, and we have no information regarding the frequency with which a recognisance embodying an undertaking to leave the United Kingdom by a specified date has been exacted of an alien held here in contravention of his landing condition, save that we were told that the same bench have acted in the same way on two previous occasions without their action being challenged.

It is notable that s. 1 (1) of the Act of 1914 contains no express reference to provision being made in the projected Order in Council requiring aliens to leave the United Kingdom. As I have already observed, para. (c) dealt with provision being made for their deportation, and that matter was in due course dealt with by art. 20 and art. 21 of the order of 1953. I find it difficult to think that art. 26 was aimed at providing, or in fact provided, a means whereby justices can bring pressure on an offender calculated to ensure that, in effect, he deports himself, the amount of the recognisance (unlike that of the fine) being left entirely unlimited both by the Act of 1914 and by the order of 1953. As to this, counsel for the applicant makes the laconic comment "Deportation is Home Office business and not the business of justices". Then, bearing in mind the wide wording of s. 1 (1) (b) of the Act of 1914, is there to be found anywhere in the order of 1953 a provision requiring an offender remaining here in breach of his landing condition to leave the country? If not, then *ex concessis* no recognisance so to do could be demanded of him.

The conclusion to which I have come is that counsel for the applicant is right in his submission that the order of 1953 contains no such provision. It might go far to supplant the Home Secretary's power to order deportation and, if it existed, one would expect it to be the subject of express provision, and not one to be spelt out by a process of inference from the Act of 1914 and the order of 1953 made thereunder. It certainly does not appear expressly and, in my opinion, it cannot be spelt out. In the result, for my part, I hold that the justices had no power to require the applicant to enter into the recognisance objected to, and, accordingly, as far as I am concerned, his application succeeds, and the order of certiorari must go to quash that part of their sentence as related thereto.

THOMPSON, J.: I agree. It would be wrong to think, as I have seen suggested, that, on this application, a scientologist is asking the judges to let him stay. It is not for us to let him stay or to decide that he should go. All that we have to decide is whether the justices had power under art. 26 of the Aliens Order, 1953, to order him to go, or whether the expulsive power in the circumstances of this case is confined to the Home Secretary. The Aliens Order, 1953, in art. 25, defines what constitutes offences against the order, and the applicant was guilty of an offence against the order; he pleaded guilty and he merited the monetary penalty which the justices imposed. No complaint is or could be made as to that part of the justices' order. Article 26, in so far as it permits justices to order an alien to enter into a recognisance to comply with the provisions of the order, must, I think, contemplate the continued presence here of the alien in conformity with permission granted, and must contemplate the possibility of the alien, while still here, complying with the requirements of some specified provision in the order or the provisions of the order generally. It surely cannot have been intended to force the justices to make an order to deport. This could only in a most oblique and unnatural sense be said to require compliance by the alien with the provisions of the order.

There is no specific provision in the order requiring the alien who is guilty of an offence against the order to depart; an order requiring him so to do is, in my judgment, not an order requiring him to comply with any specific provision in the order, nor, I think, with the provisions of the order generally. There is in art. 20 and art. 21 of the order provision for getting rid of aliens by deportation. That, and the person in whom the power is vested and the requirements he has to be satisfied about, strongly suggest that justices would not be likely to be endowed with expulsive powers or the power to achieve the result of expulsion by an order to go fortified by recognisance and prison if he did not go. Equally, it would not be likely that justices would be endowed with the power to attach a condition to his staying here, for example the forfeiture of recognisances, or prison, as the price of his continued presence here. This part of the order of the justices is either an order to go, or is the attachment by the justices of conditions under which he may stay. In my judgment, the justices have no power to attach any such condition. Article 26 (6) is, in my judgment, of some relevance to the present problem as indicating provisions of the order which an alien can comply with, and presumably can be required to comply with, under art. 26 (1).

Courts are given by the order a restricted right to recommend deportation, and the occasions on which they may so recommend are defined in Sch. 4 to the order. It would be strange if they had an unrestricted power to compel the departure of an alien on his own account without reference to the Home Secretary or the immigration authorities. It is, of course, odd that there is in the order no express provision for the removal of an alien whose time has run out. Article 8 deals with the removal of aliens who are refused leave to land; art. 9 deals with the removal of aliens landing unlawfully, etc. Article 21 deals with the removal of aliens subject to deportation orders. In this context, however, it is to be noted that art. 8 (2) provides that even an alien who has been refused leave to land may not be the subject of a direction by the immigration officer for his removal after the alien has been here for two months.

I agree that this application succeeds, and that certiorari must go.

WALLER, J.: I also agree. Counsel for the applicant based his case on three main propositions. First, he sought to relate the words in art. 26 (1) of the Aliens Order, 1953, "the provisions of this Order" with the words in art. 25 (1) "any provision of this Order" and to say, therefore, that there was no authority to enter into a recognisance to comply with a condition. I do not deal further with this argument because I find his other propositions convincing.

Secondly, he said that there was no provision with which the applicant could be made to comply. The applicant had to enter into a recognisance to leave the United Kingdom within seven days, but art. 26 (1) states that a person may only be required to enter into a recognisance to comply with the provisions of this order. There is no provision of the order, except those in art. 20 and art. 21 which deal with deportation, which deals with the alien leaving the United Kingdom, and for the present I must exclude those two articles. In order, therefore, to make the recognisance which the applicant undertook come within the above words, it would be necessary to construe the words very widely so as to read in some such fashion as "to take such steps as will result in him no longer being in breach of the order".

Counsel for the applicant's third proposition is that there is no authority in the Aliens Restriction Act, 1914, for making persons leave, except s. 1 (1) (c), which deals specifically with deportation. The rule-making power under which the Aliens Order, 1953, is made is contained in that section, s. 1 of the Act of 1914. It sets out in detail the matters which may be contained in any order



which is made. If one excludes the paragraph to which I have just referred, namely, s. 1 (1) (c), which deals with deportation, the only possible authority for this recognisance would be para. (f) of the same subsection, which provides:

“for requiring aliens residing in the United Kingdom to comply with such provisions as to registration, change of abode, travelling, or otherwise as may be made by the Order.”

It would be necessary to bring it within the words “or otherwise”, so that to give lawful authority to the recognisance in this particular case would involve a strained construction in the way in which I have indicated.

In those two propositions, the provisions of the order dealing with deportation have been excluded, but of course they should not be excluded, and, when it is seen that there is a specific rule-making authority dealing with deportation, and a specific portion of the Aliens Order, 1953, dealing with deportation, it becomes clear, in my view, that there is no place for the strained construction mentioned above. I have come to the conclusion that the provisions dealing with deportation give the only power to the court. Recognisance can only be required to comply with specific provisions, and there are no specific provisions, other than art. 20 and art. 21, which deal with deportation. Those two articles provide a special procedure, and, if it is sought to take steps to make somebody leave the country under this order, this is the procedure which will have to be adopted.

I should only add that, whenever a person is found in the United Kingdom after the expiration of the period for which he had been given permission to land, he will be guilty of an offence, and, although there has been no argument about it, the fact that he has been convicted on a previous occasion would not appear to be any bar to conviction after being found on a subsequent occasion. The decision of this court, therefore, can give no encouragement to anyone wishing to stay beyond the time of his permission. Whenever such person is found in the United Kingdom after the expiration of the period, he will be liable to be prosecuted and to be fined or sent to prison.

I agree with the order which is proposed.

Order of certiorari.

Solicitors: *Lawrence Alkin & Co.; Waugh & Co., East Grinstead.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON, L.J., VEALE AND JAMES, JJ.)

September 10, 1968

R. v. BINGHAM

Criminal Law—Sentence—Borstal training—Young offender placed on probation by quarter sessions—Offence during period of probation—Sentence of three months' detention in detention centre—Six weeks' detention served—Offender brought back to quarter sessions—Sentence of Borstal training for original offences.

On Jan. 8, 1968, the appellant, a youth of nineteen, was placed on probation at quarter sessions in respect of offences of larceny and traffic offences, a number of outstanding offences being taken into consideration. On Apr. 10, 1968, he was convicted in Scotland of attempted theft and sentenced to three months' detention. After he had served six weeks' detention, he was brought back to quarter sessions for sentence in respect of the offences in respect of which he had been placed on probation and was sentenced to Borstal training. Two probation officers and the governor recommended Borstal training.

HELD: the sentence of Borstal training was, in the circumstances, proper.

APPEAL by James Bingham against a sentence of Borstal training passed in respect of offences for which he had earlier been placed on probation.

D. G. Knight for the appellant.

SALMON, L.J., delivered the following judgment of the court: On Dec. 15, 1967, at the Southend Borough Magistrates' Court the appellant, who is a young man of nineteen, pleaded guilty to two charges of larceny and to two charges of using a motor vehicle without insurance and he was committed for sentence under the Magistrates' Courts Act, 1952, s. 28, to Southend Borough Quarter Sessions. On Jan. 8, 1968, the recorder at those sessions placed the appellant on probation for three years, having taken into consideration at the appellant's request nineteen other offences of larceny. Clearly, to put him on probation in such circumstances was to give the appellant the most exceptional chance of seeing if he could make good. He was undoubtedly warned that if he got into any further trouble he would be brought back to that court to be dealt with for the offences in respect of which he pleaded guilty and those which he had asked to be taken into consideration. On Apr. 10, 1968, at the Glasgow Sheriff's Summary Court he was convicted of attempted theft of a car radiator and he was sentenced to three months' detention in a detention centre. On May 20, he was brought back to the Southend Borough Quarter Sessions to be dealt with for the offences to which this court referred at the beginning of the judgment on the basis that he had broken his probation by committing the offence in respect of which he had been sentenced to three months in a detention centre in Scotland.

The point that is taken on his behalf really stands on what was said by LORD GODDARD, C.J., in *R. v. Gooding* (1). In that case the appellant was placed on probation at quarter sessions for two years for offences of housebreaking and larceny. That happened in October, 1954. In June, 1955, he committed another offence of larceny and was sentenced to three months in a detention centre. In October, 1955, after he had completed the three months in the detention centre, he was brought back to quarter sessions in respect of the offences for which he had been placed on probation and sentenced to Borstal training and in that case the sentence was quashed. LORD GODDARD, C.J. said:

(1) (1955), 39 Cr. App. Rep. 187.

"This court cannot consider that it is right unless in a most exceptional case—and I cannot imagine one—that a sentence of Borstal training should be passed on a young offender who has just come out of a detention centre if the offence for which he is being sent to Borstal was committed before the offence for which he was sent to the detention centre. I agree it is not an easy position, but the appellant has had three months in a detention centre for the offence which he committed after he had been put on probation. Therefore, in all the circumstances, the court thinks that it ought to set aside the sentence of Borstal training and release the appellant."

It is worth-while to observe that that case was decided before the Criminal Justice Act, 1961, and the circumstances attending a sentence of Borstal are somewhat different now from what they were then. It seems that in *R. v. Gooding* (1) the court was proceeding partly on the basis that as the object of a sentence of being confined in a detention centre was curative (the idea being that a short, sharp sentence would cure the accused of his criminal tendencies) once he had had the medicine, the whole dose, it would be inappropriate to send him to Borstal until one had seen whether the medicine had worked. There is an obvious distinction between the instant case and *R. v. Gooding* (1) because in the instant case the appellant had only served six weeks in the detention centre. Moreover, there are probation reports both from the probation officer in Essex and the probation officer in Scotland, both written after the sentence of detention, in which both the probation officers say that the appellant needs Borstal training and Borstal training has also been recommended by the governor. This court does not consider that it needs any vivid feat of imagination to imagine a case where, in spite of a sentence of detention having been passed, particularly when it has not been wholly served, it is in the interests not only of society but of the appellant himself that he should be sent to Borstal.

Some reliance has been placed on *R. v. Hammond* (2), which came before this court on Apr. 9, 1968, in which a sentence of Borstal training was quashed in circumstances closely resembling the circumstances of *R. v. Gooding* (1). There is, however, a very germane distinction between that case and the instant case because whereas in the present case the probation officers have strongly recommended Borstal, in *R. v. Hammond* (2) there were reports before the court which equally strongly suggested that Borstal training in the circumstances of that case would have been wholly inappropriate. Therefore, *R. v. Hammond* (2) does not really assist the appellant here and indeed counsel for the appellant very frankly acknowledged the distinction between that case and the present.

It is necessary also to refer to *R. v. Payne* (3). In that case an accused who had been sentenced to imprisonment was subsequently brought before a court which sentenced him to Borstal and ordered that the Borstal sentence should commence after he had completed his prison sentence. He appealed and this court pointed out that the course taken in the court below was wholly inappropriate it was wrong in principle to send an accused to Borstal after he had completed his prison sentence. This court considered however, that Borstal was an appropriate sentence and ordered that the sentence of Borstal should take effect at once so that the prison sentence would, so to speak, merge in it; he would, from the moment of the decision, go to Borstal and serve no further term of imprisonment. The course taken by the learned recorder in this case is very much the same as the course taken by this court in *R. v. Payne* (3), if one substituted the sentence of detention for the sentence of imprisonment.

(1) (1955), 39 Cr. App. Rep. 187.

(2) (Apr. 9, 1968), unreported.

(3) [1961] Crim. L.R. 416.

As already indicated, in the view of this court the sentence of the recorder was right. Only six weeks of detention having been completed and everyone being agreed that the appellant needs Borstal training there is no authority that compels this court to do other than what seems eminently reasonable and just and in the best interests of the appellant and of the public. If any authority were needed to support the course which this court proposes to take, it is to be found in the unreported case of *R. v. Laigie* (1) in which this court last term allowed a sentence of Borstal training to stand in very much the same circumstances as those which pertain in the present case.

This appeal will be dismissed.

Appeal dismissed.

Solicitor: *Elman, Flint & Co.*, Southend-on-Sea.

T.R.F.B.

(1) (July 4, 1968), unreported.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WINN, L.J. and ASHWORTH, J.)

October 8, 1968

R. v. GWILLIAM

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Breath test—Approval of Secretary of State for device used—Proof—Consignment note relating to delivery of device to police—"Record relating to trade or business"—Criminal Evidence Act, 1965 (c. 20), s. 1 (1) (a)—Road Safety Act, 1967 (c. 30), s. 7 (1).

On a charge of driving a motor vehicle with a blood-alcohol concentration exceeding the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, the defence took the point that the prosecution had not proved, as was required by s. 7 (1) of the Act, that the breathalyser used for the breath test was a device approved by the Secretary of State. The recorder (wrongly, as was admitted by the prosecution on appeal) held that a label inside the lid of the testing set was admissible evidence to prove approval. The appellant was convicted. On the appeal the Crown sought to rely on a consignment note relating to the delivery of the device to the police force concerned which stated that the goods had been sent from a Home Office supply and transport store, and contended that it was admissible as a commercial record under s. 1 (1) (a) of the Criminal Evidence Act, 1965, to prove the Secretary's approval of the device.

HELD: even if the consignment note were a record for the purposes of s. 1 (1) (a) of the Act of 1965, it was not a record relating to any trade or business, as the Home Office supply and transport branch did not carry on a "business" within the meaning of the section; the prosecution had, therefore, failed to prove approval by the Secretary and the conviction must be quashed.

APPEAL by Anthony John Gwilliam against his conviction at Hereford City Quarter Sessions of driving a motor vehicle with a blood-alcohol concentration above the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, when he was fined £10 and disqualified for driving for twelve months.

C. Clifford for the appellant.

F. W. I. Barnes for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: In February, 1968, at Hereford quarter sessions the appellant was convicted of driving a motor vehicle on a road when having an alcohol concentration in the

blood exceeding the prescribed limit contrary to s. 1 (1) of the Road Safety Act 1967. He was sentenced to a very moderate fine of £10 and disqualified from driving for twelve months. He now appeals against his conviction on the certificate of the recorder.

The short facts were as follows. In the early hours of the morning of Dec. 2, 1967, the appellant was driving on a public road in Herefordshire and in turning into a car park he swung right out to his right. At that moment there was a police car coming towards him at seventy-five miles per hour. That car had to brake hard and the appellant did not get out of the way of the car until it was within some twenty yards. The police car drove immediately into the car park and a police constable saw the appellant sitting in the driving seat and when he got out he staggered towards the police car. According to the police officer, his breath smelled of alcohol and his eyes were watery. He was taken to the police station where he underwent a breathalyser test with what is known as "Alcotest" equipment. This proved positive and half an hour later a police inspector asked him to submit to another test, again with "Alcotest" equipment, and that again proved positive. Thereupon, at about 1.30 a.m., a blood sample was taken and on analysis it was found that there was an alcohol content of not less than 130 milligrammes in one hundred millilitres of blood whereas the prescribed limit under s. 7 (1) of the Act of 1967 is eighty milligrammes of alcohol in one hundred millilitres of blood.

The sole point in this case and the point on which the recorder gave a certificate was whether there was admissible evidence from which the jury were entitled to hold that this "Alcotest" equipment which had been used was a type approved by the Home Secretary. The necessity for that is founded on the decision of the Divisional Court in *Scott v. Baker* (1), that being a case decided on May 14, 1968, and, accordingly, long after the trial in the present case. At the very outset counsel for the appellant took the point that proof was required of the approval by the Secretary of State of the "Alcotest" equipment. It was submitted by the prosecution that this was proved, or that there was evidence from which the jury could find that it was proved, from a label which was inside the lid of the testing set. That label read: "Alcotest 80. Approved by the Secretary of State for the Home Department for the purpose of the Road Safety Act 1967." That was admitted by the recorder and left to the jury as evidence on which they could hold that there had been such approval. It is now conceded by counsel for the Crown (and, in the opinion of this court, rightly conceded) that that label was not admissible evidence of approval at all. Accordingly one starts with this: that something was left to the jury which was not evidence of approval.

Notwithstanding that, it is said that this is a case for the application of the proviso to s. 2 (1) of the Criminal Appeal Act, 1968, in that approval was proved from two other matters. At the trial a superintendent named Westwood was called who was in charge of the traffic department at the police divisional headquarters at that time, and he gave evidence that equipment of this kind was issued in large quantities to the police. Secondly, and more important, he was allowed to produce a consignment note relating to the consignment from which the equipment used in the present case had come, which equipment had been delivered to police headquarters and signed for by Superintendent Westwood. That consignment note was in this form. It was headed: "Consignment Note. Road Transport, Home Office, S. & T. Branch liability" and it recited that the goods were sent (this appears in a rubber stamp) from the Home Office supply and transport store. Arbury Road, Nuneaton, Warwickshire.

Counsel for the Crown submits that that evidence by Superintendent Westwood and the consignment note itself were admissible evidence to prove the approval by the Secretary of State and he relies primarily for this on the provisions of the Criminal Evidence Act, 1965, and in particular on s. 1 (1) which provides as follows:

"In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as evidence of that fact if—

"(a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply; . . ."

Counsel for the Crown puts it in this way: that the fact of the Secretary of State's approval could be given by direct oral evidence and accordingly any statement contained in a document of the type there described which tends to establish that approval would be admissible.

This court is quite satisfied that that submission fails. It may be (and the court is not deciding this case on that basis) that it is quite impossible to say that the consignment note itself is a record or forms part of a record within the meaning of the subsection. It may also be that one could not reasonably suppose that the clerk, whoever it was, who prepared that consignment note could have personal knowledge of the matter. But what is quite clear, in the judgment of this court, is that the document, even if a record, was not a record relating to any trade or business. It is to be observed that s. 1 (4) defines "business" as including "any public transport, public utility or similar undertaking carried on by a local authority and the activities of the Post Office". In the judgment of this court the Home Office S. & T. branch does not carry on a business within the meaning of that subsection.

Really this case is no different, although counsel for the Crown has done his best to distinguish it, from *Scott v. Baker* (1). In that case there was evidence that equipment of this sort was issued to the police. There was also a circular, emanating from the Home Office itself, stating that approval had been given by the Home Secretary to the use of this equipment, and it is to be observed that in that case the prosecution themselves conceded that the circular was not admissible in evidence of proof of the approval. It is indeed hoped that this will be one of the last cases before publication of the Breath Test Device (Approval) (No. 1) Order, 1968, made by the Home Secretary, and that this matter will not arise again.

So far as this case is concerned, it is, in the opinion of this court, quite clear that there was no admissible evidence before the jury from which they were entitled to hold that the Secretary of State's approval had been proved. Accordingly the court is constrained to quash the conviction.

Conviction quashed.

Solicitors: Registrar of Criminal Appeals; T. A. Matthews & Co., Hereford.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WINN, L.J. AND ASHWORTH, J.)

October 11, 1968

R. v. PRICE

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—“Person driving”—Breath test—Test to be taken as soon as reasonably practicable after commission of offence—Vehicle stationary at time of test—Continuing offence—Failure to carry rear red lights—Road Safety Act, 1967 (c. 30), s. 2 (1).

The phrase “any person driving” a motor vehicle in s. 2 (1) of the Road Safety Act, 1967, includes not only the driver occupying the driving seat both when the vehicle is in motion and when it is stationary, but also a person who has temporarily left the driving seat, but, in general terms, can be described as the driver.

The offence of failing to carry on the rear of a vehicle at night two red lamps is a continuing offence. Where, therefore, a vehicle had been driven at night for half a mile with a defective rear light and followed by a police constable, who approached the driver after the latter had made a temporary stop and got out of the vehicle and required him to take a breath test.

Held: an offence was being committed at the time when the constable spoke to the driver and that the requirement to take a breath test was made “as soon as reasonably practicable” after the commission of the offence.

APPEAL by Kenneth Price against his conviction at Sheffield Quarter Sessions of driving a motor vehicle on a road having consumed alcohol in such quantity that the proportion of alcohol in his blood exceeded the prescribed limit (eighty milligrammes in one hundred millilitres of blood) at the time when he provided a specimen, contrary to the Road Safety Act, 1967, s. 1 (1).

P. M. Baker for the appellant.

R. A. R. Sroyan for the Crown.

LORD PARKER, C.J. delivered the following judgment of the court: In March, 1968, at Sheffield Quarter Sessions the appellant was convicted of an offence contrary to s. 1 of the Road Safety Act, 1967, in that the proportion of alcohol in his blood exceeded the prescribed limit, namely eighty milligrammes of alcohol in one hundred millilitres of blood. In fact, analysis showed that he only had some eighty-two milligrammes, so that on any view this was not a serious offence, and he was merely fined £25, and disqualified for twelve months. He now appeals against his conviction on what is really a point or points of law.

This case was decided before the decision of the Divisional Court in *Scott v. Baker* (1) and the assistant recorder directed the jury that all they were concerned with was the analysis of the blood, whether the prescribed limit was or was not exceeded, and that it was not necessary for them to consider whether the appellant had been lawfully arrested, whether he had been given the requisite breath test, and (and this is the important part of this case) whether, when he did give a breath test, he was required so to do by a constable who could lawfully require him so to do. The submission made to this court in the light of *Scott v. Baker* (1) is to the effect that the specimen must have been taken pursuant to s. 3; that it is a condition precedent to the giving of the specimen under s. 3 that the accused should have been lawfully arrested under s. 2 (4); and, that he could not have been lawfully arrested in the present case unless a breath test had been lawfully required by a constable under s. 2 (1) and that the result of that had been positive.

(1) 132 J.P. 422; [1968] 2 All E.R. 993.

The powers of a constable to require a breath test are set out in s. 2 (1) which provides that:

"A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause (a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion: Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence."

The short facts here were that the appellant in the early hours of the morning of Dec. 29, 1967, was driving some friends home out of Sheffield. They stopped at a lavatory, and at that moment a police constable came up. He had been following for some half a mile in a police car and had noticed that one of the rear lights on the appellant's car was showing white, since the red cover was broken. He did not attempt to stop the vehicle during that half mile, but when the vehicle stopped he went up and spoke to the appellant. He was merely going to warn him; he had no intention of charging him. At once he noticed, however, that the appellant smelt of drink, and when asked if he had been drinking, the appellant said that he had had two drinks. Thereupon the constable produced a breathalyser and asked him to give a breath test, which proved positive. Thereafter the appellant was arrested and taken to the police station; another breath test was made which proved positive and thereafter the specimen of blood was taken.

Counsel for the appellant here submits that the conditions precedent in s. 2 (1) to a lawful requirement by the constable did not exist. So far as the second limb is concerned, that is to say s. 2 (1) (b) he says that the officer clearly suspected, and indeed saw that a traffic offence was being committed half a mile back, yet the requirement to give a breath test was not met, "as soon as reasonably practicable after the commission of the traffic offence". This court is quite clear that that submission is wrong. The traffic offence here was a continuing offence, failing to carry on the rear of a vehicle at night two lamps both of which were red; accordingly, when the vehicle had stopped and the constable went up and spoke to the appellant, there at that moment a traffic offence was being committed. That being so, it is quite clear that if the matter had been left to the jury, they must have come to the conclusion that the requirement to take the test was made as soon as reasonably practicable after the commission of the traffic offence. The matter does not end there because, as it seems to this court, the constable was fully entitled to require a test by reason of the provision in s. 2 (1) (a). The subsection is not very happily worded because, if read literally, it would mean that the constable could only require the breath test if the person was actually driving or attempting to drive, something which is obviously impossible and not intended. Counsel for the appellant, while admitting that, says in effect that the grounds of suspicion that the appellant had alcohol in his body must relate to a time, so he says, when the vehicle is being actually driven or an attempt made to drive it.

This court can see no ground whatever for construing the subsection in that way. It seems to this court that the phrase "any person driving"—once one realises that it clearly cannot refer to the time when the vehicle is in motion—applies to what one might call generally "the driver", somebody who is not only at the steering wheel while the vehicle is in motion but somebody who is in the driving seat while the vehicle is stationary; and what is more, somebody

who has got out of the driving seat albeit temporarily and can still be termed, in general terms, "the driver". Reading the subsection in that way, it would appear additionally that if the jury had been directed on the matter they must have found that the constable was justified in requiring that test by reason of s. 2 (1) (a) as well. Accordingly, applying the proviso to the Act of 1907, the court is quite satisfied that any jury fully directed on this matter must have convicted this appellant. This appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; D. B. Harrison, Sheffield.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WINN, L.J. AND ASHWORTH, J.)

October 15, 1968

R. v. HOLT

Road Traffic—Driving with blood-alcohol concentration above prescribed limit—Breath test—Approval by the Secretary of State of device and equipment—Proof—Written statement by assistant secretary in Home Office—Criminal Justice Act, 1967, s. 2 (1) (7).

On the issue whether a device used for a breath test was equipment approved by the Secretary of State under s. 7 (1) of the Road Safety Act, 1967,

HELD: a written statement made by an assistant secretary in the police department of the Home Office which had been tendered at the committal proceedings and read out in court at the trial under the provisions of the Criminal Justice Act, 1967, s. 2 (1) and (7), was properly admitted in evidence.

APPLICATION by Sydney Holt for leave to appeal against his conviction at Lincoln (Lindsey) Intermediate General Sessions of driving a motor car with a blood-alcohol proportion over the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967. At the trial, the statement of Mr. Critchley, an assistant-secretary in the Home Office, relating to the Minister's approval of the device for a breath test tendered at the committal proceedings was read in evidence.

The applicant did not appear.

The Crown did not appear.

LORD PARKER, C.J.: A little before 3.00 p.m. on the afternoon of Jan. 7, 1968, the applicant drove his car along a public road some sixteen feet wide in Barnetby and there collided with a car parked on his nearside. He did not stop, but drove half a mile on to his home. However, his number was taken by a witness of the collision, and the police were at his house within a quarter of an hour. He at first denied that he had driven the car at the material time, but it was found that there was black paint adhering to the front bumper and that his rear bumper was bent, and finally he admitted that he had driven the car that afternoon.

In the course of the interview the police suspected he had been drinking. He was asked to undergo a breath test: this proved positive. He was taken to the police station where he was required to undergo a second breath test, which also was positive, and when a blood sample was taken it was found on analysis to contain not less than 150 milligrammes of alcohol to one hundred millilitres

of blood which is considerably more than the prescribed limit of eighty milligrammes per one hundred millilitres. So far there is nothing in this case at all.

Once again, however, the point was taken that the prosecution should prove that the equipment used for the test was equipment approved by the Secretary of State, and for that purpose the prosecution desired to read and were about to read a statement made by Mr. Critchley, an assistant-secretary in the police department of the Home Office. Objection was taken to that, according to the transcript, on the basis that it was pure hearsay, but the chairman ruled that it was admissible. It in fact was in this form:

"I am an assistant-secretary in the police department of the Home Office. In 1967 I was responsible for signifying the Secretary of State's approval of breath testing devices for the purposes of Part I of the Road Safety Act, 1967, and for the issue to the police forces in England and Wales of supplies of such devices. In the course of my duties I signified the Secretary of State's approval of the Alcotest device in a letter dated 21st June 1967 to the suppliers of the device, Messrs. Draeger Normalair Ltd. (a copy of which taken from Home Office records is attached hereto as an exhibit). On 18th July 1967 in the course of my duties I issued a Home Office circular (No. 119/1967) notifying the police of this approval. A copy of the circular is attached hereto as an exhibit. The device known as Alcotest comprises an indicator tube (marked with the name 'Alcotest'), mouth-piece and measuring bag and is supplied to police forces in England and Wales in a container marked with the name 'ALCOTEST (R) 80'. The Alcotest is the only type of breath testing device supplied to police forces in England and Wales and no other device has so far been approved."

It ended:

"This statement, consisting of two pages each signed by me, is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true."

In *R. v. Skinner* (1) Mr. Critchley gave evidence to exactly the same effect, but gave it by being called as a witness. Accordingly, insofar as the objection consists in the evidence of Mr. Critchley as an assistant-secretary as opposed to the Home Secretary himself, the applicant is clearly wrong in law.

The only other point then is whether the evidence of Mr. Critchley was admissible in the form in which it was presented. He claimed to have made a statement under s. 2 (1) of the Criminal Justice Act, 1967, which provides:

"In committal proceedings a written statement by any person shall, if the conditions mentioned in the next following subsection are satisfied, be admissible as evidence to the like extent as oral evidence to the like effect by that person."

Subsection (2) lays down the conditions; it is unnecessary to read it. It is sufficient to say that, as the chairman himself held, those conditions were fully satisfied. Accordingly, Mr. Critchley's statement was admissible as evidence in the committal proceedings.

Passing then to s. 2 (7) it provides:

"Section 13 (3) of the Criminal Justice Act, 1925 (reading of deposition as evidence at the trial) shall apply to any written statement tendered in

evidence in committal proceedings under this section, as it applies to a deposition taken in such proceedings . . ."

In fact, the indictment marked this witness as being conditionally bound over, and that being so, it seems to this court quite clear that Mr. Critchley's evidence in the form in which it was given was, as the chairman held, fully admissible in the proceedings.

The point raised by the applicant is a point of law on which he requires in the ordinary way no leave to appeal, but it is quite plain that he is wrong. The matter is referred to this court by the registrar with a view to summary dismissal under what is now s. 20 of the Criminal Appeal Act, 1968, and the court having considered the matter has come to the conclusion that it is frivolous and vexatious and can be determined without adjourning it for a full hearing and without calling on anyone to attend the hearing or to appear for the Crown. Accordingly, the court will treat this as the appeal and will summarily dismiss it.

Appeal dismissed.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(PHILLIMORE, L.J., HINCHCLIFFE AND O'CONNOR, JJ.)

October 3, 17, 1968

R. v. WOODS

Criminal Law—Alternative verdict—Offence alleged expressly or by implication in indictment—Indictment for larceny—No count for receiving—Power to convict of receiving—Criminal Law Act, 1967 (c. 58), s. 6 (3).

By s. 6 (3) of the Criminal Law Act, 1967, where a jury find a person not guilty of the offence specifically charged in the indictment, but the allegation in the indictment includes, expressly or by implication, an allegation of another offence, the jury may find him guilty of that other offence.

Where an indictment charges larceny and contains no count for receiving, a jury is not entitled to convict of receiving either at common law or by virtue of the abovementioned subsection, since the allegation of larceny does not expressly or by implication include the offence of receiving.

PER CURIAM: It is of the first importance that a man charged with an offence should know with certainty of what he may be convicted. No court should be encouraged to cast around to see whether the words of the indictment can be found to contain, by some arguable implication, the seeds of some other offence.

APPEAL by Patrick Thomas Woods against his conviction at Brighton Quarter Sessions of receiving stolen goods and his sentence of thirty months' imprisonment.

The appellant was indicted on two counts of office-breaking and larceny. The jury acquitted him on both counts, but when asked by the deputy recorder for a verdict on receiving as an alternative, they convicted.

S. G. Lambert for the appellant.

J. L. Clay for the Crown.

Cur. adv. vult.

Oct. 17. PHILLIMORE, L.J., read the following judgment of the court: The appellant appeared at Brighton Quarter Sessions on Apr. 18, 1968. He was indicted with two counts of office-breaking and stealing and the jury acquitted him on both counts. The deputy recorder asked them for a verdict on receiving as

an alternative to the first count, and on this the jury convicted. He was sentenced to two and a half years' imprisonment. The appellant appeals with leave of the single judge both against conviction and against sentence. So far as conviction is concerned, two points are taken: (i) It is said that, in the absence of a count specifically charging receiving, the court has no power to convict of it. (ii) The deputy recorder misdirected the jury on the necessary ingredient of knowledge at the time of receiving that the goods had been stolen. As to sentence, it is contended that, even in the case of an accused with a bad record, as indeed the appellant had, thirty months was excessive for receiving a second-hand suit with a spare pair of trousers. (Although other articles were referred to in the indictment, only this clothing was found at the appellant's house.)

We heard this appeal on Thursday, Oct. 3, 1968, and at its conclusion quashed the appellant's conviction stating that we would give our reasons at a later date. It is unnecessary in the circumstances to say more with regard to sentence than that no member of this court would have passed a sentence in excess of eighteen months.

Turning to conviction, counsel were agreed on two points. First, that, prior to the coming into effect of the Criminal Law Act, 1967, the appellant could not have been convicted of receiving in the absence of a count in the indictment expressly charging him with this offence. Secondly, that the question must, therefore, turn on the wording of s. 6 (3) of that Act which came into force on Jan. 1, 1968. They were also agreed that the question was a difficult one on which there was no authority. The first count of the indictment read as follows:

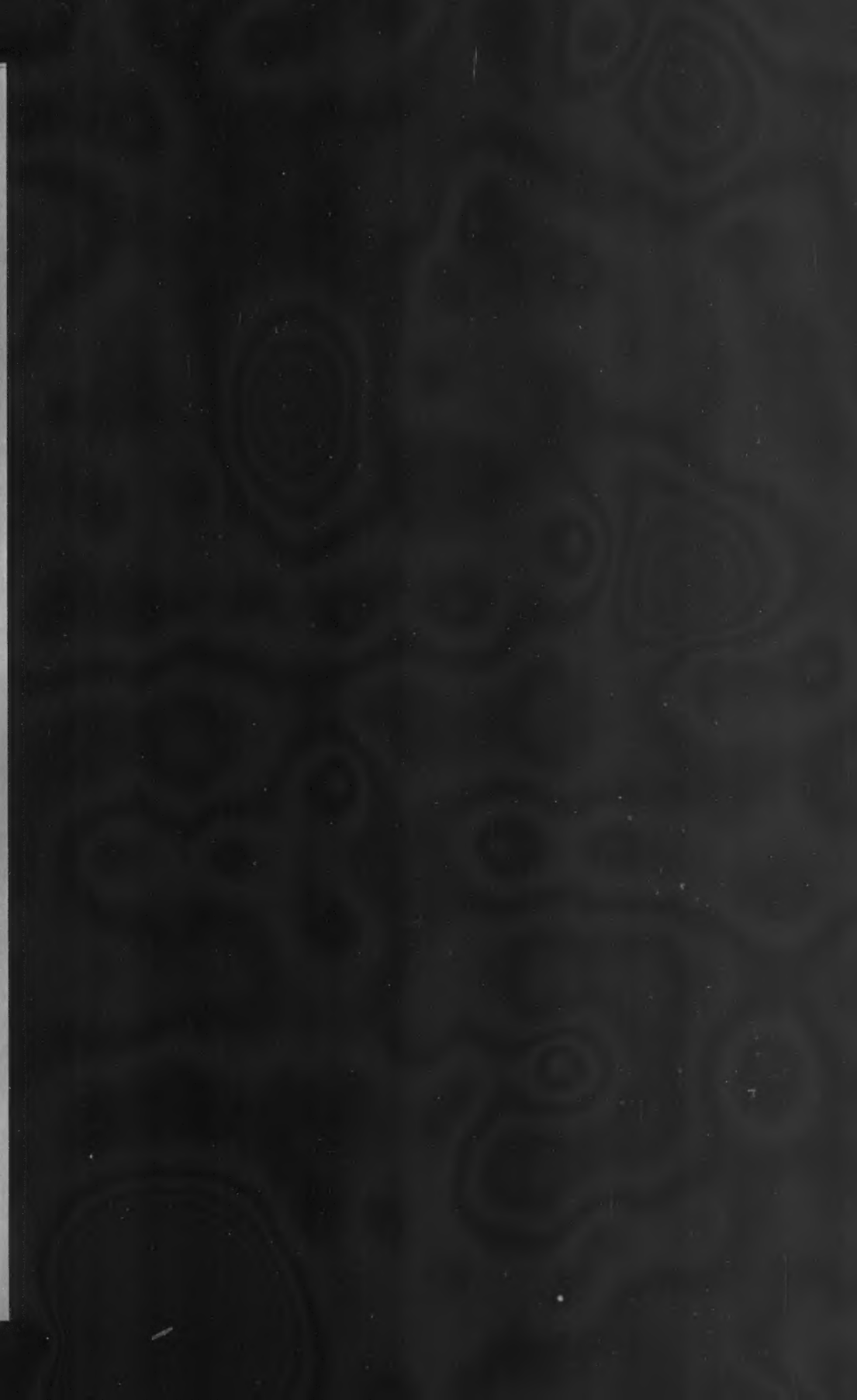
"... in that you, on or about Jan. 16, 1968, in the county borough of Brighton in the county of Sussex, broke and entered the office of the Royal Air Force Careers Information Centre and stole a jacket..."

and so on. The relevant words of s. 6 (3) of the Criminal Law Act, 1967, are as follows:

"Where, on a person's trial on indictment... the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

It seems to this court impossible to say that the allegations in count 1 expressly include the offence of receiving. Do they do so by implication? In the argument presented to us, it was suggested that a successful theft normally results in someone else receiving the stolen goods. Moreover, the successful thief gets possession and knows only too well that the goods have been stolen. It was also suggested that reference should be made to the extended provisions in regard to receiving contained in s. 4 (7) of the Criminal Law Act, 1967, and also to s. 22 of the Theft Act, 1968 (albeit the latter is not yet in force). We have approached this question by treating the judgment of LORD GODDARD, C.J., in the Court of Criminal Appeal in *R. v. Seymour* (1) as the point of departure. In that case the appellant was convicted of receiving when the fact was that he was plainly the thief. LORD GODDARD, C.J., said this:

"In cases where the evidence is as consistent with larceny as with receiving the indictment ought to contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to come to the conclusion



whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself."

It is of the first importance that a man charged with an offence should know with certainty of what he may be convicted. No court should be encouraged to cast around to see whether somehow or other the words of the indictment can be found to contain by some arguable implication the seeds of some other offence.

We have no hesitation in finding that the allegations in count 1 do *not* include the offence of receiving either expressly or by implication. We are reinforced in this view by the words in s. 22 (1) of the Theft Act, 1968:

"A person handles stolen goods if (otherwise than in the course of the stealing) [and those are the important words] knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so."

The fact is that Parliament never intended by s. 6 (3) of the Criminal Law Act, 1967, to cover what has happened here. The reference to inclusion expressly or by implication of an allegation of another offence is designed to cover the old rule of the criminal law which would justify a conviction for larceny when the offence charged was breaking and stealing and the evidence of breaking fell down, and to rectify anomalies such as the inability to convict of common assault on a count of wounding with intent. The final phrase of the section was, of course, designed to cover the normal statutory provisions which deal with alternative convictions for lesser offences and makes generally applicable the decision in *R. v. Simmonite* (1). The court had no jurisdiction to convict the appellant of receiving in the absence of a specific count charging the offence.

In any event, the direction to the jury on receiving simply will not do. It is true that the deputy recorder originally gave a direction on receiving which this court regards as entirely adequate. The passage is to be found in the transcript, and there was a further passage which was entirely proper, *but* the jury had not understood they were to deal with receiving. When they came back and acquitted and were asked to consider receiving as an alternative, the foreman said:

"We would like further instruction on that particular one. The deputy recorder.—It is for you to consider. He admits he had the goods; the question is whether, when he received them, he knew they were stolen. The foreman.—That is the question. The deputy recorder.—That is for you to decide. If you think he received them dishonestly, having a pretty good idea they were stolen—if a man has a pretty good idea that the goods are stolen and he does not ask any questions about them and still takes the goods into his possession, he has received them knowing they were stolen—he has received them dishonestly. He cannot remain silent and say, 'I did not know but I pretty well suspected'. Do you follow? That is the position. If you think that when he received those goods he must have known they had been dishonestly come by but chose not to ask any questions, that is receiving them knowing them to be stolen. That is the question on which you have to find a verdict. Do you want to consider it?"

In the judgment of this court, this direction simply will not do and yet the jury left with these words ringing in their ears. "Knowing" is not the equivalent

of "having a pretty good idea". When an offence which has not been expressly charged is being left to a jury, it is all the more important that the direction should be beyond criticism. On this ground also we are clear that this conviction must be quashed.

Conviction quashed.

Solicitors: *Registrar of Criminal Appeals; R. J. Hartwell, Brighton.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(WIDGERY, L.J., JAMES AND BRIDGE, J.J.)

September 17, 1968

R. v. BOW STREET MAGISTRATE. Ex parte KRAY

Magistrates—Committal proceedings—Order removing restrictions on publicity—Formal remand proceedings—Jurisdiction of magistrates—Grouping of charges—No indication that order was to apply in respect of some charges only—Operation of original order—Criminal Justice Act, 1967 (c. 80), s. 3 (2), s. 35, s. 36.

On May 9, 1968, the applicant, together with a number of other persons, was charged at a magistrates' court with a number of indictable offences. He was formally remanded until May 17 when the hearing had not proceeded beyond consideration of preliminary matters, and on the application of counsel for the applicant the magistrate made an order under s. 3 (2) of the Criminal Justice Act, 1967, removing the restrictions on publicity which would otherwise be imposed by s. 3 (1) of the Act. Nothing was said at the time by either counsel or the magistrate to indicate that the order was to apply in respect of some of the charges only and not in respect of others. There were a number of further formal remands. When the prosecution were ready to proceed with the taking of depositions, owing to the number of defendants and the number and complexity of the charges, it was decided that the depositions should be taken in eight groups of charges. Preliminary proceedings were taken in respect of seven groups, sometimes concurrently in different court rooms and sometimes consecutively over a period of time, and when the evidence on each group had been heard, the magistrate either committed for trial or refused to convict. On Sept. 10, 1968, the eighth and last group came before a magistrate, who, after hearing argument, ruled under r. 1 (2) of the Magistrates' Courts Rules, 1967, that the order made on May 17 permitting publication still affected the proceedings which were about to begin before him.

HELD: the order of May 17 was within the jurisdiction of the magistrate who made it, because, on the construction of s. 3 (2) of the Act of 1967 the jurisdiction to make such an order was not confined to the duration of committal proceedings in the sense in which the term was generally understood, and the use of the phrase "magistrates' court" indicated that it was not necessary that the court in question should be sitting as examining justices; alternatively, even if jurisdiction to make such an order did not arise until the committal proceedings had begun, under s. 35 of the Act the proceedings before the examining justices, and, accordingly, the committal proceedings as defined in s. 36, had begun on May 17; since the order of that date referred to all the committal proceedings then pending against the applicant, in respect of which he was then before the court, it included the proceedings pending on Sept. 10.

MOTION by Reginald Kray for (a) leave to move for an order of certiorari to remove into the Queen's Bench Division of the High Court to be quashed an order of Sept. 10, 1968, made by the stipendiary magistrate sitting at Bow Street Magistrates' Court under s. 3 (2) of the Criminal Justice Act, 1967, directing that the restriction on reporting the proceedings then before him had been lifted

(by virtue of an application made under the section) on May 17, 1968, and that such order related to the then present proceedings and was irrevocable; and (b) leave to move for an order of mandamus directed to the magistrate sitting at Bow Street Magistrates' Court requiring him to order that the restriction on reporting the proceedings then before him had not been lifted in accordance with s. 3 (2) of the Criminal Justice Act, 1967.

Paul Wrightson Q.C., and *M. Sherborne* for the applicant.

H. J. Leonard and *C. J. Crespi* for the Crown.

Sir Peter Rawlinson, Q.C., and *J. P. Harris* for Beaverbrook Newspapers, Ltd.

I. J. Lawrence for five of the co-defendants.

P. Hamilton for five of the co-defendants.

R. S. J. Brock for another co-defendant.

A twelfth co-defendant was not represented.

WIDGERY, L.J.: In these proceedings counsel for one Reginald Kray moves for an order of certiorari to remove into this court an order of the metropolitan magistrate, Mr. GERAINT REES, sitting at Bow Street Magistrates' Court, which was made on Sept. 10, 1968, and was described in the statement supporting the application as an order directing that an order lifting restrictions on making public the proceedings then pending at Bow Street should remain in force. Also there is an application for an order of mandamus directing the same magistrate in relation to the same proceedings that restrictions on making public the proceedings before him in the magistrates' court remain in force and apply to the rest of the proceedings before that court.

The matter arises out of a series of charges presently being investigated at the Bow Street Magistrates' Court and affecting the applicant and a number of other people. The problem posed before this court and its solution both relate to the proper interpretation of s. 3 of the Criminal Justice Act, 1967, and I can conveniently refer to that section now:

"(1) Except as provided by subsections (2) and (3) of this section, it shall not be lawful to publish in Great Britain a written report, or to broadcast in Great Britain a report, of any committal proceedings in England and Wales containing any matter other than that permitted by subsection (4) of this section. (2) A magistrates' court shall, on an application for the purpose made with reference to any committal proceedings by the defendant or one of the defendants, as the case may be, order that the foregoing subsection shall not apply to reports on those proceedings."

So far then the position is clear: there is a general embargo on publicity in regard to committal proceedings, unless an application is made by a defendant for the lifting of the embargo, whereupon the court must make an order to that effect. The rest of the section goes on to deal with certain matters which can be published notwithstanding the provisions in sub-s. (1), and finally provision is made in sub-s. (5) for a penalty in the event of a breach of the terms of the section.

Regulations have been made under this Act, and I think it appropriate to deal with the one which is relevant to this matter. They are the Magistrates' Courts Rules, 1967 (1). Rule 1 (2) provides that:

"Where a magistrates' court has made an order under section 3 (2) of the Criminal Justice Act 1967 removing the restrictions on reports of committal proceedings and has adjourned those proceedings to another day the court shall, at the beginning of the adjourned hearing of those proceedings, state that the order has been made; and any such order shall be entered in the register."

For completeness, before I leave the Act of 1967, I should refer to two other sections which figured significantly in argument. Section 36 contains definitions, including a definition of "committal proceedings". These mean "proceedings before a magistrates' court acting as examining justices". Finally s. 35 provides:

"It is hereby declared for the avoidance of doubt that a magistrates' court before which a person is charged with an indictable offence begins to act as examining justices as soon as he appears or is brought before the court, except where before that time the court has determined under section 18 of the Magistrates' Courts Act 1952 to try him summarily."

What happened in the present case, so far as it is material to the matters stated, is that the applicant, together with a number of others, was arrested on either May 8 or 9, 1968, and on May 9 he was charged with a number of offences. They were offences of a very widely differing kind, including various conspiracies, demanding with menaces, a conspiracy to murder a male person unnamed and otherwise unidentified, and an additional count in similar terms. No attempt, of course, was made to begin the committal proceedings in the popular sense on that day, because the prosecution were not ready and were not likely to be ready for some weeks. A number of the preliminary matters which arise on these occasions were dealt with, and there was a formal remand until May 17. On May 17 preliminary matters were again considered, and in particular on that occasion counsel for the applicant pursued an objection to the form of one of the last two counts to which I have referred, submitting that the charge was defective if it referred to a male person without identifying him and without saying that that person was unknown to the prosecution. This particular complaint subsequently came to this court, and I need not say more about the merits of it, but arising out of the debate which was then engendered, counsel for the applicant made application to the magistrate under s. 3 (2) asking for an order releasing the ban on publicity which would otherwise be imposed by sub-s. (1). Nothing was said at the time to indicate the scope of the order sought, that is to say, nothing was said at the time to indicate that the order was to apply to committal proceedings in respect of some charges and not in others.

We cannot, of course, here specifically reconstruct what was said, but counsel, to whom the court is indebted for his assistance on this matter, accepts that he applied for an order in general terms, and an order was accordingly made, as indeed was mandatory under the terms of the section. Further formal remands took place week by week until the prosecution were ready to begin tendering evidence for the purposes of depositions, and in fact the first hearing before a magistrate at which the depositions were really taken did not occur, I understand, until about June 21, 1968. By this time the case had assumed complexities, having regard to the number of accused and the number of charges, which made it appear desirable to the Director of Public Prosecutions that the depositions should be taken in groups of charges. Accordingly, a division was made whereby eight groups of charges were selected, and preliminary proceedings in respect of each group were duly taken, each of these preliminary proceedings being followed by a committal or refusal to commit when the evidence on that group had been heard. The various groups of cases were dealt with by two, or I think three, different magistrates, and they proceeded sometimes concurrently and sometimes consecutively over the intervening time. Thus one finds that on the first group of charges dealing with conspiracy to dispose of bonds, committal occurred on Aug. 14 after a hearing which had begun on July 30. Then there was another group of charges dealing with conspiracy to murder, where committal took place on July 23, proceedings having begun on July 17,

and so it went on, there being at the present time only one group of charges remaining on which depositions have not been taken, and a decision to commit or not to commit not been reached. This remaining group of charges came before Mr. REES, on Sept. 10, and it is his ruling in regard to them which brings the matter before this court. Again, it is not altogether clear precisely what happened on Sept. 10, but in some way the question was raised whether the proceedings then about to begin would be subject to a restriction on publicity under s. 3 (1) or whether they would be open to publicity under an order made under s. 3 (2).

I think it clear from what we have been told that the learned magistrate did not attempt to make an order under sub-s. (2) on this occasion, and indeed it would have been entirely wrong for him to have done so because no defendant at this stage sought that such an order should be made. The magistrate, however, considered whether the order which had been made as long ago as May 17 applied to these proceedings, that is to say the proceedings which he was about to begin, and having decided after argument that that order did apply, he pronounced accordingly. At that stage he was invited to adjourn the proceedings so that the opinion of this court could be taken, and thus the matter comes before us today. It is, I think, right to point out at once that the relief sought does not seem to me to be wholly appropriate in view of the recital of facts which I have given, because it must be made clear that the learned magistrate was not making a *de novo* order on Sept. 10, but was merely declaring that an existing order affected the proceedings then about to begin, and I think that for myself the proper way to look at the matter is that the magistrate was exercising the duty cast on him by r. 1 (2) of the Magistrates' Courts Rules, 1967, to which I have referred. Under that rule he was required to state that an order under s. 3 was in force, if he was of the opinion that it was. He was therefore required to decide whether such an order was in force, and if he erred in law in the decision which he reached, his decision is properly to be considered by this court on *certiorari*.

The submissions which have been made before us are capable, in my judgment, of being put in a relatively short compass. The contention of counsel for the applicant is that under the terms of the statute, as properly understood, an application for an order under s. 3 (2) and the making of an order under that section can take place in committal proceedings and in committal proceedings only. Further, he submits that in the circumstances which I have outlined, no committal proceedings had been taken on May 17 when the order was purported to be made, and accordingly in his submission the answer to this problem is a very short one, namely that the order purported to be made on May 17 was a nullity from the outset. Section 3 of the Criminal Justice Act, 1967, is still a relatively new provision, and it is understandable that people will make mistakes in its application. Counsel for the applicant submits with the candour which we expect from him that he was really in error in applying for an order on May 17, because in fact the circumstances prevailing at that date did not create jurisdiction in the magistrate to make the order. In his submission, committal proceedings as normally understood did not begin until the magistrate began to enquire into a set of charges by hearing evidence therein in accordance with the Magistrates' Courts Act, 1952. Accordingly, so counsel submits, on May 17 no committal proceedings had begun, accordingly there was no jurisdiction to make an order under s. 3 (2), the order which the magistrate purported to make was a nullity, and he should have recognised that fact when the matter came before him for further consideration on Sept. 10.

In my judgment, the first difficulty which counsel's argument encounters is its insistence on the fact that no order can be made under s. 3 except in committal

proceedings. For my part I can see nothing in the section or the rest of the Act of 1967 which so requires. When one examines sub-s. (2) again, it is to be observed at once that it is a magistrates' court which is authorised to make an order under the section, and speaking for myself I should have thought that if the draftsman had intended its jurisdiction to exist only in committal proceedings, he would have used the phrase which he used in s. 4, "examining justices". As is well known, the phrase "magistrates' court" is a very wide phrase; it is defined in s. 124 of the Magistrates Courts' Act, 1952, as meaning:

"any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law"

and I should have thought that the choice of the phrase "magistrates' court" in the opening words of s. 3 (2) of the Act of 1967 was a powerful indication of the fact that the draftsman was not contemplating that the court in question should necessarily be sitting as examining justices. Then again, when one looks further into the terms of the subsection, at no point is it said that the order is to be made in committal proceedings. What the section contemplates is that an application for an order shall be made with reference to some committal proceedings, whereupon the order made is also to apply to those proceedings. For my part, I can see no reason whatever why, if it appears to the defence to be convenient, they should not ask for an order under s. 3 (2) at an early stage in the proceedings, indeed at the stage which had been reached on May 17 in the matter which is now before us. I can well understand that it might be convenient to deal with this matter at an early stage. I can see no reason why it should be regarded as inappropriate, or why Parliament should have had a different view and given the words of s. 3 (2) other than their plain and simple meaning. I can see no reason why the jurisdiction to make an order under the subsection is confined to the duration of the committal proceedings as generally understood.

Even if that is wrong, and even if counsel for the applicant is correct in his submission that jurisdiction to make an order does not arise until the committal proceedings themselves have begun, it seems to me that the present case would still be covered by s. 35 of the Act of 1967 to which I will refer. Counsel for Beaverbrook Newspapers, Ltd., based his argument on s. 35, although if necessary he would adopt the argument to which I have already referred on the construction of s. 3 (2) itself. When, however, one looks at s. 35—omitting for the moment any reference to the exception—the words, in my judgment, seem perfectly simple and clear for the situation with which we are concerned; the section provides that, if the accused is charged with an indictable offence, the magistrates' court before which he is charged begins to act as examining justices as soon as he appears or is brought before the court. Those words in their ordinary meaning can only mean one thing, that is that if an accused is brought before a magistrates' court charged with an indictable offence, then the magistrates begin to act as examining justices not from the time when the evidence is opened, but from the time when the accused is brought before the court. If the section is to be given, as it seems to me, its straightforward and obvious meaning, then the result is that in the present case the proceedings at Bow Street were to be regarded as proceedings by a magistrates' court acting as examining justices from the very first day on which the accused was brought before them namely on May 9. Accordingly, even if counsel for the applicant is right in his first submission, it seems to me that in this case, by virtue of s. 35, the proceedings by examining justices, and thus the committal proceedings, defined under s. 36, had begun by May 17, when the order was made.

Counsel for the applicant has submitted that it has been understood for generations that committal proceedings begin when the evidence begins to be taken. He has urged with force that a change in that old-established principle which is enshrined now in the Magistrates' Courts Act, 1952, is not lightly to be assumed in a subsequent Act such as that with which we are now concerned, and indeed he submitted, as I understood him, that s. 35 had had its counterpart in earlier legislation, and he referred us to s. 49 (2) of the Criminal Justice Act, 1925. But having due regard to all those matters, it seems to me quite clear that the main purpose in s. 35 of the Act of 1967 is not to be found in the earlier statutes; s. 35 is designed to mark the first moment when the committal proceedings begin, and I can see nothing in any previous statute which has canvassed that particular problem. I am in no doubt in my own mind that the purpose of s. 35, to which we must give effect, is that proceedings before a magistrates' court in respect of an indictable offence are to be treated as committal proceedings unless and until the exception mentioned in s. 35 applies.

So I am brought to this position, that I feel forced to reject the argument of counsel for the applicant that this order was an order which was a nullity from the outset. In my judgment, it was not a nullity, and one now has to consider the subsidiary question of precisely what proceedings were within its scope. Here again I go back to the wording of s. 3 (2), from which it seems to me apparent that the order is applicable to the proceedings with reference to which it was made. No doubt as time passes and more experience of the Act of 1967 is obtained, it will become increasingly important that in an application for an order under s. 3 (2) considerable care may have to be taken to define the proceedings to which the order is to refer. Many difficulties, actual and hypothetical, have been canvassed in the course of argument, and for reasons which I need not state in full, this court is not minded to endeavour to deal with them all, but it may be that experience will show many of these difficulties can be removed if precision is adopted in an application for an order under the section, and in the making of the order itself, so that there is no doubt as to the particular proceedings to which the order is to relate. This was not done in the present case, and the last thing I would wish to do is to suggest that that is a reflection on anybody. One can well understand how this matter arose, but the fact still remains that when the order was sought and granted, no reference whatever was made in detail to the proceedings to which it was to refer.

What then should we do? One alternative which is urged on us by counsel for the applicant is, I think, fairly stated by saying that the scope of the order is too vague, and having due regard for the concern which the court should show for an accused, we ought to take the view that the order was really of no effect. For my part, I am unable to take that view. It seems to me clear that an order was sought and granted, and that it must apply to some proceedings, and it is for us to determine what those proceedings were by reference to what occurred at the time. It is submitted by counsel for the applicant that these committal proceedings should be regarded as one, and that so regarded they must have come to an end initially on June 21 when one of the accused, called Welch, was committed for an offence of inflicting grievous bodily harm on a victim named Adams. The argument, if I can do justice to it, is that when those committal proceedings finished under the terms of s. 4 of the Act of 1967 the order granted on May 17 had spent its force, and that no order under s. 3 (2) would then be effective unless a new one was sought and made. Here again I feel unable to accept counsel's argument. I can well understand that, in a case like the present, on one view the division of the charges into groups creates a number of different committal

proceedings, but I see no reason whatever why in appropriate circumstances a request for an order under s. 3 (2) and the order which follows it should not apply to a number of different committal proceedings.

If in terms the order refers to committal proceedings A, B, C and D, then so be it. In the end, I have been driven to the conclusion that this order of May 17 was made with jurisdiction, and that on the facts presented to us the only possible conclusion is that the committal proceedings to which that order had a reference were any committal proceedings in which the applicant was a defendant and in respect of which a charge had been made before May 17 when the order was made. The only common-sense view, as I see it in this case, is that when the order was made on that date, it referred to all the proceedings pending against the applicant at that date, in respect of which he was then before the court. If that is the correct view, the order referred, *inter alia*, to the proceedings now pending before Mr. REES; I think he reached the correct conclusion, and I would dismiss this application.

JAMES, J.: I agree entirely with everything that WIDGERY, L.J., has said.

BRIDGE, J.: I agree.

Application dismissed.

Solicitors: *Sampson & Co.; Director of Public Prosecutions; Allen & Overy; Montague Gardner & Howard; E. Edwards, Son & Noice.*

T.R.F.B.

CHANCERY DIVISION

(PENNYCUICK AND MEGARRY, JJ.)

October 2, 1968

M. (J.) v. M. (K.)

Magistrates—Procedure—Adjournment—Review by appellate court of exercise of discretion by magistrate—Refusal by magistrate to grant adjournment of hearing in absence of party.

On Jan. 9, 1967, an order was made by the stipendiary magistrate at Manchester under the Guardianship of Infants Act, 1886, and the Guardianship and Maintenance of Infants Act, 1951 (as amended), giving the custody of the child of the marriage to the mother, with access, precisely defined, to the father. In November, 1967, non-compliance as to access was alleged by the father who made a complaint which was served on the mother. On Nov. 27, 1967, the mother wrote a letter to the chief constable expressing her inability to attend the hearing, which had been fixed for Nov. 29, 1967, and asking for an adjournment. On Nov. 29, 1967, the stipendiary magistrate refused an adjournment, proceeded with the hearing in the absence of the mother, and under the Magistrates' Courts Act, 1952, s. 54 (3), ordered her to pay a sum of £10. On appeal by the mother,

HELD: an appellate court ought to be very slow to interfere with the discretion of a court on such a question as the adjournment of a trial, but where the result of the order made in the court below would be to defeat the rights of the parties altogether or would be an injustice to one or other of the parties, the appellate court had power to review such an order and it was its duty to do so; accordingly, although the mother's reason for not attending the hearing was very tardy and far from convincing, the refusal of one adjournment as distinct from any further adjournment was wrong, and the appeal would be allowed.

APPEAL by the mother of an infant against a conviction recorded against her at Manchester Magistrates' Court on Nov. 29, 1967, whereby she was adjudged to have failed to comply with an order made on Jan. 9, 1967, in favour of her husband giving him reasonable access to the child of the marriage under the Guardianship of Infants Act, 1886, and the Guardianship and Maintenance of Infants Act, 1951 (as amended), and was fined £10. The respondent was her husband, the father of the infant.

J. B. R. Hazan for the mother.
The father did not appear.

PENNYCUICK, J.: This is an appeal by the mother of an infant against an order made on Nov. 29, 1967, by the stipendiary magistrate at Manchester. That order was made under certain provisions of the Guardianship of Infants Act, 1886. The stipendiary magistrate imposed a total fine of £10.

The facts can be stated as follows. The mother is the wife of the father, and there is an infant child of that marriage. By an order of Jan. 9, 1967, custody of the infant was committed to the mother, with access to the father, the access being precisely defined, namely, from Sept. 1 to Mar. 31 inclusive, each Sunday from 10.30 a.m. to 6.00 p.m., and, in the summer months, from Apr. 1 to Aug. 31 inclusive, each Sunday from 10.30 a.m. to 7.00 p.m., the meeting place being in Lewis's Arcade, Manchester.

The father complained that the mother did not comply with that order as regards access, and in November, 1967, he made a complaint in the magistrates' court at Manchester. The complaint was duly served on the mother at some date earlier than Nov. 27, 1967. At the very last moment, namely, on Nov. 27, the mother wrote to the Chief Constable at Manchester in the following terms:

"I regret that I am unable to attend the sitting at the Magistrates' Court on Nov. 29, 1967, because as an industrial nursing sister I have several patients to take care of, and these cases cannot be delayed until another date. I apologise for any inconvenience caused by such short notice, but I will appreciate the sitting being arranged for a later date."

That excuse is not a convincing one and, in any event, the letter was sent at the very last moment.

The case came before the stipendiary magistrate. He refused to adjourn the hearing. He proceeded in the absence of the mother, and having heard the case in her absence he made an order under s. 54 (3) of the Magistrates' Courts Act, 1952. That subsection is in these terms:

"Where any person disobeys an order of a magistrates' court made under an Act passed after the thirty-first day of December, eighteen hundred and seventy-nine, to do anything other than the payment of money or to abstain from doing anything, the court may—(a) order him to pay a sum not exceeding one pound for every day during which he is in default; or (b) commit him to custody until he has remedied his default: . . ."

It will be observed that that is a penal section, and the learned magistrate imposed a fine under that section.

The mother has appealed against that order, the grounds of appeal being as follows:

"1. That the learned magistrate was wrong in law and thereby failed to exercise his discretion judicially in refusing [her] an adjournment, [and proceeded to hear the case in her absence]; 2. That thereby the principles of natural justice were violated in that [she] was found guilty of an offence akin

to contempt of court in failing to comply with an order of the court without being heard; 3. That [she] had not failed to comply with the said order of the court."

The appeal comes before this court, sitting as a Divisional Court of the Chancery Division, under the provisions of the Administration of Justice Act, 1960, s. 13 (5) (c) and R.S.C., Ord. 109, r. 2 (2) (b). The mother has filed an affidavit in support of the appeal. The father has been duly served but has not appeared on the appeal.

We were referred by counsel for the mother to certain authorities as to the principles on which the court acts where the tribunal from which an appeal is brought has refused an adjournment. The leading case is *Maxwell v. Keun* (1) and I will read two short passages from the judgments. ATKIN, L.J., said:

"The other point made by the defendants was that this was a discretionary order and that the Court of Appeal ought not to interfere with the discretion of the learned judge. I quite agree that the Court of Appeal ought to be very slow, indeed, to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

LAWRENCE, L.J., said:

"Further, it is plain that if he is not present at the trial his case must fail, in other words, he will not have had an opportunity of having his case properly tried and thus of obtaining justice. I will assume for this purpose that his advisers committed an error of judgment in applying [for the postponement of the trial] at the time when they did; that they ought to have applied some weeks earlier. I cannot myself think that the penalty for that error of judgment is that the plaintiff should not have his case heard."

The principle laid down in that case has been followed by the Divisional Court of the Probate, Divorce and Admiralty Division in two subsequent cases to which we were referred, namely, *Scutt v. Scutt* (2) and *Walker v. Walker* (3). It is, I think, clear that the principle must apply with full force where the order made is of a penal character as it was here. It seems to me that in this case the learned magistrate ought to have given the mother an opportunity of being heard, and for that purpose, on Nov. 29, 1967, notwithstanding the short notice and the flimsy excuse which she gave, he ought to have granted an adjournment. I say nothing as to what would have been the position if she had again made an excuse for not attending the adjourned hearing, but on this first occasion he ought, I think, to have granted the adjournment. It would have been open to him to compensate the father, so far as necessary, by an appropriate order as to costs.

I have great hesitation in interfering with the discretion exercised by the learned stipendiary, but I think this is a case in which justice would not be done if we allowed the order to stand. Therefore, the order ought to be quashed.

MEGARRY, J.: I agree. The reason given by the mother for not attending the hearing at the magistrates' court was very tardy and far from convincing,

(1) [1927] All E.R. Rep. 335; [1928] 1 K.B. 645.

(2) [1950] W.N. 286.

(3) [1967] 1 All E.R. 412.

but I entirely agree that the refusal of one adjournment as distinct from any further adjournment would be wrong and that this court both can and ought to allow the appeal.

Appeal allowed.

Solicitors: *Brown, Cotton & Bower*, for *Slater, Heelis & Co.* Sale, Cheshire.

R.D.H.O.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 21, 1968

MARKHAM v. STACEY

Road Traffic—Land implement—Scraper used for civil engineering work—Levelling and excavating land and removal of soil—"Land implement" confined to vehicle used in general farming and forestry land work—Motor Vehicles (Construction and Use) Regulations, 1966 (S.I. 1966 No. 1288), reg. 3.

The term "land implement" in reg. 3 of the Motor Vehicles (Construction and Use) Regulations, 1966, is confined to a vehicle used in general farming and forestry land work, and does not include a vehicle used for civil engineering work on building sites.

The respondent was charged with offences against s. 64 (2) of the Road Traffic Act, 1960 (as amended), arising out of his use on a road of a motor tractor drawing a four-wheeled trailer. The allegations were that the trailer contravened six different regulations of the Motor Vehicles (Construction and Use) Regulations, 1966. The trailer was a scraper primarily used for civil engineering work for levelling and excavating land and moving soil. A representative of the area distributor of these machines gave evidence that, during his twenty-two years' experience, he could not recollect a single case of such a machine being sold or used for agricultural purposes. At the close of the case for the prosecution a submission was made by the defence that the scraper was exempt from compliance with the regulations, in that it was a "land implement" within the meaning of reg. 3. The justices upheld the submission and dismissed the informations. On appeal by the prosecutor.

HELD: the scraper was not a "land implement" within the meaning of reg. 3, and the case must be remitted to the justices to continue the hearing.

CASE STATED by Chelmsford justices.

On Oct. 18, 1967, informations were preferred by the appellant, Geoffrey Roy Markham against the respondent, Philip Stacey charging, inter alia: (i) that he, on Sept. 8, 1967, did use a certain motor vehicle, namely a motor tractor, drawing a four-wheeled trailer on a road, the overall length of such trailer exceeding seven metres, contrary to reg. 58 (1) of the Motor Vehicles (Construction and Use) Regulations 1966, and s. 64 (2) of the Road Traffic Act, 1960, as amended by the Road Traffic Act, 1962; (ii) that he, on Sept. 8, 1967, did use a certain motor vehicle, namely a motor tractor, drawing a four-wheeled trailer on a road the overall width of such trailer exceeding 2.5 metres, contrary to reg. 59 (1) of the Motor Vehicles (Construction and Use) Regulations 1966, and s. 64 (2) of the Road Traffic Act, 1960, as amended by the Road Traffic Act, 1962; (iii) that he, on Sept. 8, 1967, did use on a road a certain trailer, namely a four-wheeled trailer, which trailer was not equipped with an efficient braking system, contrary to reg. 60 (1) of the Motor Vehicles (Construction and Use) Regulations 1966, and s. 64 (2) of the Road Traffic Act, 1960, as amended by the Road Traffic Act, 1962; (iv) that he, on Sept. 8, 1967, did use a certain motor vehicle, namely a motor tractor, drawing a four-wheeled trailer on a road, such trailer not being

equipped with suitable and sufficient springs between each wheel and the frame of the trailer, contrary to reg. 10 of the Motor Vehicles (Construction and Use) Regulations 1966, and s. 64 (2) of the Road Traffic Act, 1960, as amended by the Road Traffic Act, 1962; (v) that he, on Sept. 8, 1967, did use on a road a motor vehicle, namely a motor tractor, drawing a four-wheeled trailer, the trailer not being equipped with wings or other similar fittings to catch, so far as practicable, mud or water thrown up by the rotation of the wheels, contrary to reg. 63 of the Motor Vehicles (Construction and Use) Regulations 1966, and s. 64 (2) of the Road Traffic Act, 1960, as amended by the Road Traffic Act, 1962; (vi) that he, on Sept. 8, 1967, did use on a road a motor vehicle drawing a four-wheeled trailer on which the distinguishing mark in the form set out in the diagram contained in Sch. 6 to the Motor Vehicles (Construction and Use) Regulations 1966, required to be exhibited in a conspicuous position on the back of the trailer was not so exhibited, contrary to reg. 66 of the Motor Vehicles (Construction and Use) Regulations 1966, and s. 64 (2) of the Road Traffic Act, 1960, as amended by the Road Traffic Act, 1962.

On the hearing of the informations at Chelmsford Magistrates' Court on Nov. 27, 1967, the following facts were found: On Sept. 8, 1967, at 10.20 a.m. the respondent was driving a motor tractor registration number HYF 619 on the A.12 road at Margaretting, in the county of Essex. The motor tractor was towing a four-wheeled trailer namely a "Vickers Onions" scraper. The overall length of the scraper (including towbar) was 9.906 metres (thirty-two feet, six inches). The overall length of the said trailer (excluding towbar) was 8.22 metres (twenty-seven feet); the overall width of the scraper was three metres (nine feet, 10½ inches); the scraper had no braking system, no springs and no wings or similar fittings; the scraper had no distinguishing mark fitted to it; the specifications and appearance of the scraper were accurately represented in the manufacturer's pamphlet annexed to the Case. Machines of the type of the scraper were designed and primarily used for civil engineering work, their function being to level land and excavate and move earth on building or road construction sites and similar places. Machines of this type would have, in ordinary circumstances, no use on a farm or in connexion with agriculture. Such machines might conceivably be used to dredge a shallow ford or to carry equipment, but such would not be their normal use. They might possibly be used for ditching or hedge clearing, but it would be a complicated procedure to use them for this purpose. A representative of the area distributors of such machines was unable to recollect from his twenty-two years' experience a single case of such a machine being sold or used for agricultural purposes. There was no evidence to show whether or not the respondent had used, or intended to use, the scraper or if so, for what purpose.

In relation to all the informations, it was contended on behalf of the respondent that the scraper was a "land implement" within the meaning of reg. 3 of the Motor Vehicles (Construction and Use) Regulations 1966, and therefore not subject to the requirements of the regulations. It was contended on behalf of the appellant that the scraper was not a "land implement" and was therefore subject to the requirements of the regulations. The only evidence which was adduced before the justices by the appellant as to the precise nature of the towing vehicle was that it was described as the front part of an articulated motor vehicle.

The justices were of the opinion that the four-wheeled trailer, the subject of informations (i) to (vi) inclusive, was a "land implement" being an implement used with a land tractor in connexion with land levelling, dredging and similar operations in accord with reg. 3 of the Motor Vehicles (Construction and Use)



Regulations 1966, and that in consequence reg. 58 (1), reg. 59 (1), reg. 60 (1), reg. 10, reg. 63 and reg. 66 of the Motor Vehicles (Construction and Use) Regulations 1966, did not apply to the four-wheeled trailer, and that the respondent had no case to answer. They accordingly dismissed the said information against the respondent.

The prosecutor now appealed.

M. C. B. West for the appellant.

D. J. Mellor for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county of Essex sitting at Chelmsford who dismissed six informations preferred by the appellant against the respondent for breaches of the Motor Vehicles (Construction and Use) Regulations 1966. The vehicle in question was a "Vickers Onions" scraper which is illustrated in an advertisement attached to the Case, and is in effect a large machine for scraping earth and then carrying it from one place to another. Its real use is for civil engineering work where land had to be levelled and excavated and the soil moved from one site to another site.

It was alleged that this bit of equipment exceeded the maximum permitted length, exceeded the maximum permitted width, did not have a proper braking system, did not have proper springs and was not equipped with wings and other similar fittings, all of which is undoubtedly true if the regulations in question apply to this bit of equipment. The defence was that this bit of equipment was a land implement within reg. 3 of the regulations, and that as such it was exempted from the provisions of the various regulations which were said to have been broken in the present case. The sole question, therefore, is whether this was a land implement within the regulations. The justices, and I sympathise with them, came to the conclusion that it was. "Land implement" is defined as meaning any implement or machinery used with a land locomotive or a land tractor in connexion with agriculture, grass cutting, forestry, land levelling, dredging or similar operations. The case for the prosecution is that really those operations are all operations in connexion with agriculture in its wide sense, be it farm, forestry, fishery or the like, and that only by looking at it in that way can one arrive at a genus covering the "similar operations". For my part, though I do not think it is altogether clear, I have come to the conclusion that the prosecution is right. It seems to me that only thus does one get a genus, and moreover when one looks at the definition of "land tractor" it is to be observed that it is an implement designed and used primarily for use on the land; it uses the same expression, used in connexion with agriculture, grass cutting, forestry, land levelling, dredging or similar operations; and then goes on to provide that it must also be operated by a person engaged in agriculture or forestry or of a contractor engaged in the business of carrying out on farms or forestry estates any such operation as aforesaid.

It is quite clear, therefore, that in connexion with "land implement" the use of the vehicle is confined to what I call general farming and forestry land work and would not cover civil engineering work on building sites.

There was evidence before the justices that it was difficult to conceive of any real use that this bit of equipment could be put to on a farm, and indeed a representative of the area distributors was unable to recollect from his twenty-two years' experience a single case of such a machine being sold or used for agricultural purposes. Whilst sympathising with the justices, I think they did come to a wrong decision in this case, and I would allow the appeal and send the case back with

a direction to continue the hearing. I would only add this, that the justices may have thought that, if they held that this was not a land implement, it simply could not be taken from one site to another on the road. If that did influence their consideration, they are clearly wrong because it only means that permission has to be obtained for this heavy bit of equipment to be moved along the road.

ASHWORTH and WILLIS, JJ., concurred.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, for *T. Hambrey Jones*, Chelmsford;
Stamp, Wortley & Co., Witham.

T.R.F.B.

COURT OF APPEAL

(LORD DENNING, M.R., DIPLOCK, L.J. AND GOFF, J.)

July 1, 2, 3, 1968

BURNSIDE AND ANOTHER *v.* EMERSON AND OTHERS

Highway—Non-repair—Liability of highway authority—Flooding—Highways (Miscellaneous Provisions) Act, 1961 (9 & 10 Eliz. 2, c. 63), s. 1.

By s. 1 (1) of the Highways (Miscellaneous Provisions) Act, 1961: "The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated."

In proceedings brought under this sub-section neither the occasional flooding of a stretch of road nor the mere presence of a pool of water on the road on a particular occasion can be relied on of itself to show failure on the part of the highway authority to maintain.

APPEAL by the second defendants, Nottinghamshire County Council, from a decision of WRANGHAM, J., giving judgment against them in favour of the first plaintiff for £10,500 damages for non-feasance in the maintenance of a highway.

K. Mynett, Q.C., and *J. P. Harris* for the second defendants.

H. A. Skinner, Q.C., and *J. Malcolm Milne* for the first defendants.

The plaintiffs did not appear.

LORD DENNING, M.R.: This is an action for non-feasance against a highway authority. It has only been available since the Highways (Miscellaneous Provisions) Act, 1961. On Sept. 3, 1965, at about 9.0 p.m., the first plaintiff, Mr. Burnside, was driving his Jaguar motor car along the main road from Melton Mowbray to Nottingham. It had been pouring all day. At this moment the rain was coming down harder than ever. The first plaintiff was driving his Jaguar car at quite a reasonable pace, only twenty-five miles an hour. On that night no one should have done any more. Mr. Emerson was coming in the opposite direction, driving his Rover motor car. As Mr. Emerson drove along, his car ran into a pool of water which was half-way across the road; and in the result his Rover car went right across the road into the path of the oncoming Jaguar car. There was a collision. The Rover swung right round in the road facing the other direction and forced the Jaguar into the kerb. Mr. Emerson, the driver of the Rover, was killed. The first plaintiff, the driver of the Jaguar, and his wife, the second plaintiff, suffered such serious injuries that the damages have been agreed at £10,500 for the first plaintiff and £3,000 for the second plaintiff. The plaintiffs brought an action at first against the executors of Mr. Emerson, claiming damages on the ground that it was Mr. Emerson's fault

because he pulled right across on to his wrong side of the road; but then, in answer, the executors said that it was not Mr. Emerson's fault. It was the fault, they said, of the second defendants, the Nottinghamshire County Council, because they had not done their duty in regard to the highway, in that they had not drained the road properly. So the plaintiffs joined the second defendants as defendants. After hearing the evidence, the judge found that it was all due to the fault of the second defendants, the highway authority. The second defendants appeal to this court. The plaintiffs are not concerned. They will get their damages from one side or the other. The contest is between the two defendants. Are the second defendants liable for the condition of the road as it was that night? If they are liable, was Mr. Emerson himself at all to blame?

In the old days a highway authority was never liable in a civil action for non-feasance in not repairing a road. Even if they put in a system of drainage which turned out to be inadequate, they were not liable for the failure of the system. That was held to be non-feasance: see *Burton v. West Suffolk County Council* (1). That law has been altered by the Highways (Miscellaneous Provisions) Act, 1961, which must be read with the Highways Act, 1959. Under those Acts the rule exempting a highway authority for non-feasance is abolished. There is a duty on a highway authority to maintain the highway; and "maintain" includes repair. If it is out of repair, they fail in their duty; and if damage results, they may now be made liable unless they prove that they used all reasonable care. The action involves three things:

First: The plaintiff must show that the road was in such a condition as to be dangerous for traffic. In seeing whether it was dangerous, foreseeability is an essential element. The state of affairs must be such that injury may reasonably be anticipated to persons using the highway. I said as much in 1956 in the unreported case of *Morton v. Wheeler* (2), which was accepted as correct by the Privy Council in *The Wagon Mound (No. 2), Overseas Tankship (U.K.), Ltd. v. Miller Steamship Co. Pty., Ltd.* (3). In applying this test after the Act of 1961, the courts at first were too much inclined to find a danger when there was none, or, at any rate, none that could reasonably be foreseen. In Liverpool people used to claim damages from the Liverpool Corporation whenever they tripped on a flagstone which might be half-an-inch higher than the next. In the first case which reached this court, *Griffiths v. Liverpool Corpn.* (4), the corporation admitted that there was a danger and, accordingly, were held liable. This court, however, threw a great deal of doubt on the finding of danger. In the next case, *Meggs v. Liverpool Corpn.* (5), the court made it clear that the highway was not to be regarded as dangerous simply because there might occasionally be a ridge of half-an-inch or three-quarters of an inch. So those actions in Liverpool began to diminish. Very recently, CUMMING-BRUCE, J., added a useful footnote in *Little v. Liverpool Corpn.* (6). He hoped that those sitting on legal aid committees would remember that it is not every trifling defect in a footway which makes it dangerous.

Secondly: The plaintiff must prove that the dangerous condition was due to a failure to maintain, which includes a failure to repair the highway. In this regard, a distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to the elements. When there are potholes or ruts in

(1) 124 J. P. 273; [1960] 2 All E.R. 26; [1960] 2 Q.B. 72.

(2) (Jan. 31, 1956), unreported.

(3) [1966] 2 All E.R. 709; [1967] A.C. 617.

(4) 130 J.P. 376; [1966] 2 All E.R. 1015; [1967] 1 Q.B. 374.

(5) [1968] 1 All E.R. 1137.

(6) [1968] 2 All E.R. 343.

a classified road which have continued for a long time unrepaired, it may be inferred that there has been a failure to maintain. When there is a transient danger due to the elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain. LINDLEY, J., said in 1880 in *Burgess v. Northwich Local Board* (1):

"An occasional flooding, even if it temporarily renders a highway impassable is not sufficient to sustain an indictment for non-repair . . ."

So I would say that an icy patch in winter or an occasional flooding at any time is not in itself evidence of a failure to maintain. We all know that in times of heavy rain our highways do from time to time get flooded. Leaves and debris and all sorts of things may be swept in and cause flooding for a time without any failure to repair at all.

Thirdly: If there is a failure to maintain, the highway authority is liable *prima facie* for any damage resulting therefrom. It can only escape liability if it proves that it took such care as in all the circumstances was reasonable; and, in considering this question, the court will have regard to the various matters set out in s. 1 (3) of the Act of 1961.

I turn to consider these three matters here. The first point is whether at this moment the road was dangerous. The area surveyor was asked this question:

"Q.—And would you agree too that the combination of a pool of water at the point we have been talking about, plus this bend, plus bad weather conditions, plus rain, would make this a particularly dangerous hazard to a motorist? A.—Yes, I would."

So the first point was proved. The road was dangerous.

The second point is whether there was failure to maintain. The mere presence of this pool of water on that night does not by itself show a failure to maintain. It had been raining all day. The pool of water had not been very deep for very long. Mr. Bailey, a farmer, who drove along at 8.0 p.m. had had no difficulty. It had become deep at 9.0 p.m. Later on, at 10.0 p.m., the pool was there, but was going down; but the evidence did not rest merely on the presence of the pool of water. There was additional evidence which showed that this stretch of road was not kept properly drained. It was quite often flooded when there was rain. A bus driver gave evidence. He had been going up and down the road for some years. He said that the road was always flooded there after rain. Mr. Broughton, who had been chairman of the parish council for many years, said that in the old days, when there were lengthsmen who walked this length of road, he used to complain to them, and they would scrape out the debris. But in recent years the lengthsmen had been replaced by a gang who visited at longer intervals. He used to complain to the surveyor then when the road was flooded; but it took them a good deal longer to put it right. After this accident had occurred, the parish council themselves wrote to the highway authority, saying:

"At a recent parish meeting complaints were made regarding water lying on the main Nottingham/Melton road opposite the school and between the two gravel pit hills. This is considered very dangerous and I was instructed to request you to deal with this hazard as soon as possible."

To which the local authority simply said: "The points mentioned are being investigated . . ." Yet, according to the evidence, nothing further was done. I will not go further into the details of the evidence. The judge examined it all. He found that, although the system which the second defendants had installed

(1) (1880), 45 J.P. 256; 6 Q.B.D. 264.

was a good system and would have been sufficient if it had been carried out, nevertheless, their servants failed to operate this system properly. He said that they failed in three ways: (i) by failing to ensure that the drain was at the lowest point (it appears that there was a dip in the road at this point. A six-inch drain had been put in; but then the second defendants had raised the road two or three inches and, when they did so, the drain had not been put at the lowest point. It had been partly obstructed by the making of the road); (ii) by failing to keep the grips or gulleys in such a condition that they would take the water from the road (in coming to that finding it is plain that the judge rejected the evidence of the foreman and the workmen of the second defendants. According to them, everything was perfect; every month their entries said: "Satisfactory" —that nothing needed doing. The judge rejected their evidence. He thought that it was too good to be true); (iii) by failing to see that the ditch was properly cleaned out so that it would take the water from the gulleys. I think that these findings by the judge were borne out by the evidence, and show a failure to maintain.

The third point is whether the second defendants showed that they used all reasonable care. Counsel for the second defendants relied on s. 1 (3) (d) of the Highways (Miscellaneous Provisions) Act, 1961, which provides that regard must be had to

"whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway."

The judge did not mention s. 1 (3) (d) of the Act of 1961, but I am sure that he had it in mind. It is plain on his findings that the second defendants could reasonably have been expected to know that the road always flooded after rain. They did not discharge the burden of proving that they had taken all such care as was reasonably required. Their servants had failed to operate the system properly, as they should have done. This failure was a cause of the pool of water, and, undoubtedly, damage resulted therefrom.

Then the final point arises: Was it all the fault of the second defendants, or was it in some part the fault of Mr. Emerson? This pool of water was three to four inches at the edge by the kerb, but only about a quarter-of-an-inch in the middle of the road. I should have thought that any driver driving at a reasonable pace and with reasonable care should have got through with safety. If he had been driving at a reasonable pace, he would not have swung across right into the path of an on-coming car, as did Mr. Emerson that evening. The nature of the impact and of the damage done leads inevitably to the inference that Mr. Emerson must have been driving far too fast in the conditions then prevailing. An expert thought that the combined pace of the vehicles must have been seventy miles an hour, or more. If that was right, it would mean that Mr. Emerson was going at fifty miles an hour, which was far too fast in the circumstances. I fear that he was considerably to blame. What should the proportions be? After discussion with my bretheren, I come to the conclusion that the fault was two-thirds on the part of Mr. Emerson and one-third on the part of the second defendants. I would allow the appeal to that extent, and alter the judgment accordingly.

DIPLOCK, L.J.: I agree with the order proposed by LORD DENNING, M.R., and have very little to add. The duty of maintenance of a highway which was by s. 38 (1) of the Highways Act, 1959, removed from the inhabitants at large of any area, and by s. 44 (1) of the same Act was placed on the highway authority,

is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing-up of BLACKBURN, J., in 1859 in *R. v. Inhabitants of High Halden* (1). "Non-repair" has the converse meaning. Repair and maintenance thus include providing an adequate system of drainage for the road; and it was in this respect that the judge found that the second defendants, the highway authority, in this case had failed in their duty to maintain the highway. I think that, on the evidence, for the reasons given by LORD DENNING, M.R., he was entitled to make that finding.

A mere failure to repair gives rise to no cause of action unless the failure to repair results in a danger to the traffic using the road and damage caused to some user of the highway by the existence of that danger. In this case, the highway surveyor of the second defendants himself conceded that the existence of a pool on the highway of the kind which was proved to have existed in this case did constitute a danger; though I am bound to say that I, myself, doubt whether any driver driving with reasonable care at a proper speed in the conditions of the night which were described in the evidence would have sustained any injury as a result of the pool of water. However, in view of that concession and of the learned judge's finding, I must, I think, accept that the plaintiffs here made out a good cause of action against the second defendants under s. 1 (1) of the Highways (Miscellaneous Provisions) Act, 1961. The nature of that cause of action and of the defences available to the highway authority were discussed by this court first in *Griffiths v. Liverpool Corpn.* (2), and I do not desire to add anything to the analysis I sought to make in that case of the cause of action. In my view, again for the reasons given by LORD DENNING, M.R., the second defendants did not succeed in establishing that they had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous.

Counsel for the second defendants relied mainly on s. 1 (3) (d) of the Act of 1961, and urged on this court that the second defendants could not reasonably have been expected to know that the condition of the part of the highway at this particular point in the road was likely to cause damage to users of the highway. I agree with LORD DENNING, M.R., and I think with the learned judge, though he did not deal specifically with this particular matter, that the second defendants did not succeed in proving that. If they did not know—and certainly up to 1968 through their maintenance surveyor they did know that this particular portion of the road was liable to flood unless the gullies were regularly cleaned—they certainly ought to have known it. The surveyor himself said that the drainage system of a highway ought to provide for a fall of one inch of rain in an hour. This portion of the road on the evidence plainly did not do so on this occasion, nor was there any evidence that it had done so on any other occasion. In my view, the second defendants failed to make out any of the defences available to them under the section.

As I have already indicated, the view which I take of the danger involved in such a pool to a driver driving with due care and attention is that it is not a very high degree of danger. I think that Mr. Emerson must plainly have been driving negligently. I agree with LORD DENNING, M.R., that the blame is much more his than that of the second defendants who allowed the pool to form there, and

(1) (1859), 1 F. & F. 678.

(2) 130 J.P. 376; [1966] 2 All E.R. 1015; [1967] 1 Q.B. 374.

I agree with the apportionment of two-thirds of the blame to lie on him and one-third on the second defendants.

GOFF, J.: I agree with the order proposed and the reasons which LORD DENNING, M.R., has given for it, and I will only add one comment of my own. It is this: the surveyor, when he put forward a standard of an inch of rain in an hour, was in fact considering modern roads newly constructed; and he thought that, in the case of an older road, that might be too high a standard, even though it was part of a Class A road. The learned judge, however, in his judgment fully allowed for that, and it was quite clear that, even making such allowance, the rainfall on the occasion in question was not anything like as great as that which the second defendants' own divisional surveyor said the drainage system ought to be adequate to remove.

Appeal allowed in part.

Solicitors: *Sharpe, Pritchard & Co.*, for *A. R. Davis*, Nottingham; *Alick Altman & Co.*, Nottingham.

F.G.

COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES and FENTON ATKINSON, L.J.J.)

July 18, 1968

R. v. THOMPSON

Criminal Law—Sentence—Probation order—Breach—Undesirability of fresh probation order.

Where there has been a clear breach of a probation order, a court should pause a long time before making a fresh probation order in respect of the same offender.

APPEAL against sentence.

The appellant, Robert Clive Thompson, while on probation, pleaded guilty to a subsequent offence of shopbreaking and larceny and was fined £25. He was brought back before the court which had made the probation order and sentenced to six months' detention in a detention centre for the original offence. He appealed against that sentence as being wrong in principle.

R. D. B. Davies for the appellant.

No counsel appeared for the Crown.

EDMUND DAVIES, L.J., delivered the following judgment of the court: This court takes the view that a tribunal should pause a long time before, a clear breach of a probation order having been committed, a fresh probation order should again be made. If that is done without proper reflection beforehand, it greatly weakens the force of probation orders, it brings the machinery of the whole probation service into contempt, and public harm would result therefrom. This is a typical example of the sort of case where we decline the invitation to make a fresh probation order, for we are quite satisfied that it would be inimical to the public interest to take such a course.

On June 7, 1967, at the West Riding Sessions the appellant Robert Clive Thompson, who, with the leave of the single judge, appeals against sentence, was convicted of burglary and larceny of goods valued at some £44. He was then put on probation for three years. Since that is the offence with which we are concerned today, let me indicate some of its features. This appellant

was then jointly charged with a boy of sixteen with burglary and larceny. The premises involved were an hotel in Castleford, which they entered by breaking a rear window. Of the goods taken some £10 was in cash and the offence was committed some time before 4.30 a.m. on Apr. 8, 1967. A man saw the appellant and his sixteen-year old companion carrying a cardboard container near colliery premises. He asked them to leave, and they replied that they would do so in their own good time. Then this gentleman, a Mr. Pallister, looked inside the carton and saw a large quantity of cigarettes and bottles, and thereupon sent for the police. When the constable arrived he told them that he was arresting them, and the appellant gave his name as Hepworth and said that they had only found the goods in the cardboard container. When he was interviewed at the police station he gave several different names, and eventually said "All right, we broke into a pub". He then made a statement admitting the offence. Those were the circumstances of the offence which led to his being placed on probation for three years in June, 1967.

On Apr. 5, 1968, he pleaded guilty at Leeds Magistrates' Court to shop-breaking and larceny. Three other offences were taken into consideration, and he was fined £25. The circumstances of the offence then charged were that in March, 1968, he broke into a shop in Leeds. He broke a window in the front door, but since he could not gain entry because there were bars inside he went around to the rear of the premises, broke a window there, climbed through, and stole over £50 from the till. He asked the justices to take three offences of larceny into consideration, and he was then fined.

On June 12, 1968, at the West Riding Sessions before the chairman, JUDGE WILLIS, on proof and admission of the offence to which he pleaded guilty at Leeds on Apr. 5, and the proper procedure on such an occasion having been gone through, he was sentenced by the chairman to six months' detention. He has urged that the present sentence will prevent him from sitting certain examinations; he is serving an apprenticeship, and imprisonment will prevent him further from signing on for a technical course in September; he adds that his father needs him, his mother having left home. He is eighteen years of age, serving his apprenticeship as an electrician. In July, 1966, in the juvenile court he was fined for disorderly conduct, and in February, 1967, he was fined £10 on summary conviction for officebreaking. He was not represented at the West Riding Sessions because he declined to be represented. The probation report of May 31, to which reference will shortly be made, was before the court. He had no questions to put to the police officer, he had no witnesses whom he wished to have called before the court, and he had nothing to say in mitigation to the chairman and his colleagues. Nevertheless, it is now urged on his behalf that the circumstances are such that we should declare a sentence of six months' detention wrong in principle. He is at Swinfen Hall, the administration of which is geared to deal with young men like the appellant over a period of six months, and he would be due for discharge on Oct. 11.

Counsel has urged on his behalf that this offence was committed in drink, that his time in detention has brought him up sharply and taught him a salutary lesson. The probation officer's report, which was before sessions, is not on the whole a good one. It indicates that he can work hard and well when he wants to, and it ends in this way:

"... he has shown himself capable of making an effort in some, but not all, directions. In conclusion, one cannot view the future with any degree of optimism, although there is a possibility that [the appellant] will continue to be more open and live a more ordered existence than hitherto."

He was placed on probation, as I have said, despite the fact that very shortly before being placed on probation he had been fined for officebreaking. He committed this grave offence in April, 1968, and asked for other offences to be taken into consideration. How can we say that the West Riding Sessions, saying that he had shown his contempt for the probation order made in his favour in June, 1967, were wrong in principle in sending him to detention? We cannot. We think on the contrary that Sessions took the only possible course in the interests both of the appellant and the public, and his appeal must therefore be dismissed.

Appeal dismissed.

Solicitor: *Registrar of Criminal Appeals.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WINN, L.J. AND ASHWORTH, J.)

October 3, 1968

R. v. WALTERS

Criminal Law—Sentence—Incorrigible rogue—Limitation of sentence—Sentence on basis of having acquired status—Sentence not for offences which led to acquiring of status—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 10.

The appellant was found guilty at a magistrates' court of being a rogue and vagabond under s. 4 of the Vagrancy Act, 1824, in respect of an offence of indecent exposure. He was remanded for a report, and a few weeks later at the same court pleaded guilty to a similar offence. After a further remand he was committed to quarter sessions for sentence in both cases as an incorrigible rogue under s. 5 of the Act of 1824. He was then sentenced to two consecutive terms of nine months' imprisonment.

HELD: the appellant appeared for sentence as having acquired the status of an incorrigible rogue and not for the offences which led him to acquire that status; the maximum sentence permissible under the Act was one of twelve months' imprisonment, and a sentence of twelve months' imprisonment should be substituted.

APPEAL against sentence.

The appellant, John Roger Walters, appealed against sentence of nine months' imprisonment on each of two charges under s. 4 of the Vagrancy Act, 1824, imposed when he was committed to Surrey Sessions on May 14, 1968, as an incorrigible rogue under s. 5 of the Act of 1824.

G. D. Mercer for the appellant.

The Crown was not represented.

LORD PARKER, C.J., delivered the following judgment of the court: On Mar. 6, 1968, at Guildford Magistrates' Court the appellant was found guilty of indecent exposure in a train at Haslemere. He had already been convicted in the past of similar offences. He was not charged with indecent exposure as such, but under s. 4 of the Vagrancy Act, 1824. The court adjourned the case for a medical report, and when the appellant appeared again some few weeks later he pleaded guilty to a further similar offence committed in a train near Clapham Junction. He was remanded again for a report, but finally he was committed in both cases as an incorrigible rogue to Surrey Sessions under s. 5 of the Act of 1824. There the deputy chairman sentenced him to nine months' imprisonment consecutive on each charge,

making eighteen months in all. It is against that sentence that the appellant now appeals on a point of law, namely, that there was no power to impose consecutive sentences making eighteen months in all and that under s. 10 of the Vagrancy Act, 1824, imprisonment is limited to twelve months.

The point taken by counsel for the appellant is really this, that once he is deemed to be an incorrigible rogue, that is a continuing state of affairs, and that when the matter reaches quarter sessions, it is for that state that he is sentenced and not for the offences on which he is deemed to be an incorrigible rogue. This court is quite clear that that submission is right when one considers the wording of s. 4, s. 5 and s. 10 of the Act of 1824. Section 4, as is well known, sets out a great number of offences, and states that when found guilty of an offence under that section he—

“... shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender ... to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months ...”

Accordingly, it is clear at any rate that on one offence he can be dealt with by the justices and sentenced up to a period of three months.

Section 5, however, goes on to provide that any person who shall be convicted of such an offence having already been convicted of a similar offence “shall be deemed an incorrigible rogue”, and then there is power in the justices to commit him to quarter sessions for sentence. The relevant part of s. 5 provides that he—

“... shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender ... to the house of correction, there to remain until the next general or quarter sessions of the peace ...”

Finally, s. 10 provides:

“When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order ...”

That, as it seems to this court, is from the time of the making of the order by quarter sessions.

Accordingly, this court is quite clear that when the appellant was committed to quarter sessions, albeit on matters arising on two charges under s. 4, he fell to be dealt with for the condition which he was deemed to be in as a result of each of those offences, namely an incorrigible rogue, and the maximum for that offence is twelve months' imprisonment. In those circumstances, the court feels that there is really no option in this case but to set aside these two consecutive sentences of nine months, and to substitute a single period of imprisonment. Counsel for the appellant has urged us to make that sentence one of nine months simpliciter, but in the opinion of this court the appellant clearly deserves a sentence of twelve months; twelve months is a permissible sentence, and that sentence will be substituted.

Sentence varied.

Solicitor: *Registrar of Criminal Appeals.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 22, 1968

COX v. HARRISON

Road Traffic—Driving licence—Provisional licence—Conditions attached—Motor bicycle—Whether "sidecar" attached—Tubular steel framework without structure—No facility for safely carrying passenger—Facility for carrying goods if secured—Motor Vehicles (Driving Licences) Regulations, 1963 (S.I. 1963 No. 1026), reg. 7 (1) (d).

An information was preferred against the respondent alleging an offence against reg. 7 (1) (d) of the Motor Vehicles (Driving Licences) Regulations, 1963, in that, being the holder of a provisional licence, he failed to comply with a provision of licence by driving a motor bicycle, not having attached thereto a sidecar, while carrying on it a person who was not a qualified driver. The respondent, who held a provisional licence only, drove a motor bicycle with a passenger on the pillion seat who was not a qualified driver. Attached to the nearside of the motor bicycle was a flat tubular steel framework on which there was no bodywork, platform or structure of any kind, but there was a wheel with an inflated pneumatic type attached to an axle which was welded to the inside of the framework. A passenger could not safely be carried on the framework, but goods such as planks could be carried on it, if secured. The justices dismissed the information. On appeal by the prosecutor,

HELD: the bare chassis did not constitute a sidecar; accordingly, the offence was proved; and the case must be remitted to the justices with a direction to convict.

CASE STATED by Nottingham justices.

The appellant, Sydney Lewis Cox, preferred an information against the respondent, Barry Harrison, charging that he on July 16, 1967, being a person to whom a provisional licence to drive a motor vehicle had been granted, failed to comply with a condition subject to which the provisional licence was granted in that he drove a motor vehicle, namely, a motor cycle, being of a class or description which he was authorised to drive by virtue of the provisional licence and not having attached thereto a sidecar while carrying on it a person who was not a qualified driver, contrary to reg. 7 (1) (d) of the Motor Vehicles (Driving Licences) Regulations, 1963, and s. 102 of the Road Traffic Act, 1960.

The information was heard at Nottingham City Magistrates' Court on Jan. 26, 1968, when the following facts were found.

On July 16, 1967, the respondent was driving a motor cycle, and at the same time there was on the pillion seat a passenger who was not a qualified driver. Attached to the nearside of the motor bicycle was a flat tubular steel framework; there was no bodywork, platform or structure of any kind on the framework. There was a wheel with an inflated pneumatic tyre attached to an axle which was welded to the nearside of the framework. There was the normal spring and suspension unit affixed to this wheel and axle. A passenger could not safely be carried on the framework, but goods such as planks could be carried on it if secured, for example, by a rope.

The justices were of opinion that the respondent's machine was a motor bicycle, and that the attachment thereto was a sidecar. They dismissed the information. The prosecutor appeared.

I. A. B. McLaren for the appellant.

The respondent did not appear.

ASHWORTH, J.: Counsel for the appellant, the respondent not being represented, told the court in opening the appeal that this was regarded as a case of some importance, because apparently in and around the city of Nottingham a practice has grown up whereby young men acquire motor cycles which in the normal way would have to be 250 c.c. or less and on which, by virtue of the Motor Vehicles (Driving Licences) Regulations, 1963, reg. 7 (1) (d), they could not carry a pillion passenger unless he was a qualified driver, and attach to the machines a form of axle with a wheel on the outside end, making a framework which would be sufficient to support a sidecar, but on which they in fact construct nothing. Having produced this sort of contraption, they claim to be allowed to have motor cycles of much greater capacities than 250 c.c. and to be allowed to carry on their pillion seat a passenger who is not a qualified driver. It was to meet that situation that these proceedings were brought.

The main issue before the justices was the question whether this structure attached to the nearside of the motor cycle could properly be described as a sidecar, because it is conceded that if the vehicle looked at as a whole was a motor cycle with a sidecar, no offence was committed. The justices first had to consider whether this could be called a motor tricycle; they came to the conclusion, and for my part I agree with them, that this vehicle which I have endeavoured to describe was not a tricycle. I need not deal with that matter further, save to say that I agree with the decision and the reasons which they gave for it on that issue. Having decided that the respondent's machine was a motor bicycle, they then came to the conclusion that the attachment to that motor bicycle was a sidecar, and they, accordingly, dismissed the information.

If I may say so, I am grateful to counsel for the appellant for the trouble which he has taken to explore the history of the regulations now applicable to this class of case, which are in fact the Motor Vehicles (Driving Licences) Regulations, 1963. It is perhaps convenient to start with the predecessor of those regulations, which is to be found in some regulations entitled the Motor Vehicles (Driving Licences) Regulations, 1950, and by reg. 16 (3) (a) of which it was provided, amongst other things,

"... that for the purposes of this sub-paragraph a motor bicycle shall not be deemed to be constructed or adapted to carry more than one person unless it has a sidecar constructed for the carriage of a passenger attached."

Counsel for the appellant fastens on that provision as showing that when the executive have in mind regulations relating to sidecars, the type of vehicle they are contemplating is a sidecar constructed for the carriage of a passenger. Those regulations have been replaced by the Motor Vehicles (Driving Licences) Regulations, 1963, and it is right to say at once that these new regulations contain no such provision regarding the description of a sidecar as that which I have just read. The material part is to be found in reg. 7, which provides:

"... (1) the holder of a provisional licence shall comply with the following conditions in relation to motor vehicles of a class or description which he is authorised to drive by virtue of the provisional licence, that is to say he shall not drive or ride such a motor vehicle—(a) otherwise than under the supervision of a qualified driver who is present with him in or on the vehicle ..."

That particular provision, so far as it relates to a motor cycle, is qualified by reg. 7 (2) (e), the material part of which is that the conditions specified in reg. 7 (1) (a) "... shall not apply when the holder of the provisional licence ... (e) is riding a motor bicycle, whether or not having attached thereto a sidecar." Regulation 7 (1) (d) provides that he shall not ride, in the case of a motor bicycle,

a vehicle not having attached thereto a sidecar, while carrying on it a person who is not a qualified driver, that is to say that the ordinary motor cycle with no sidecar can only be ridden by a learner driver with a passenger if that passenger is himself a qualified driver. These regulations do not specify what is required for an attachment to qualify as a sidecar, but, before considering the matter in a little more detail, it is perhaps convenient to consider why this separation should be made. It may be the answer is as follows: that a motor cycle ridden by a learner driver and carrying a pillion passenger is *prima facie* a dangerous vehicle, partly due to its nature and partly due to the fact that in a given case the driver is inexperienced, and in order to meet that difficulty Parliament has in effect done two things, first it has provided that if the pillion passenger is a qualified driver he may be carried, and secondly whether he is qualified or not, if the vehicle has got a sidecar then a passenger may be carried, as I read it in that sidecar. That was the intention, although the wording does not expressly say so, because it was thought no doubt that if the learner driver on the motor cycle had the additional safeguard of a passenger in a sidecar, there was less risk of an accident happening. Although it is not necessary to decide the point, I agree with counsel for the appellant that on the wording if in fact the motor cycle is provided with something which is properly called a sidecar, then a passenger may be carried either in the sidecar or as a pillion passenger on the machine itself, but of course it must be a sidecar.

No decision of this court has been found by counsel for the appellant in which the question: "What is a sidecar?", has come up for decision, but his industry has enabled him to unearth a decision which is referred to in 115 *JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW*; at p. 611, under "Notes of the Week", a decision of the Bristol justices is cited. In that case a contraption was fitted by the side of a motor cycle in the shape of a box which was used to carry building materials. The prosecution contended that as the attachment was not able to take passengers, it was not a sidecar within the meaning of the regulations. The defence argued that it was a sidecar properly attached, and that it was not necessary that it should be for the conveyance of passengers, and the justices accepted the submission of the defence and dismissed the summons.

It may be that the issue raised in that case will come up for decision before this court in the same or slightly different form in some future case, and, therefore, I feel for my part that it would be unwise to express a positive decision whether that decision of the Bristol justices was right or wrong. I say that with all the more reason because it is not necessary for the purposes of the present case to decide whether the sidecar must be one that is constructed or adapted for the carriage of passengers and nothing else, or whether a sidecar can properly be constructed by means of a chassis and some box or basket on it which would carry materials rather than passengers. For my part, I would prefer to leave that issue to be decided when it is raised, but I am quite certain that to constitute an attachment a sidecar, it must be capable of carrying persons, and the facts found in this case show to my mind that there was no form of structure on this attachment. It is true that goods such as planks could be carried on it if secured, but I suppose that even the presence of the axle with the wheel and the fact that it was welded to the motor bicycle itself will have made some form of platform which would enable planks to be carried. I think myself that a bare chassis, such as this was, is not a sidecar, and that the justices, although I have some sympathy with them, misdirected themselves in saying that in the absence of a definition of sidecar on the lines which I have endeavoured to indicate, they found that the offence was not proved. In my view, the offence was proved

because this contraption is not a sidecar, and, accordingly, the respondent had no business to have been riding with a pillion passenger who was not qualified on the day in question. I would allow the appeal and direct that the case be remitted to the justices with a direction to convict.

WILLIS, J.: I agree.

LORD PARKER, C.J.: I also agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co., for D. W. Ritchie, Nottingham.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 23, 1968

NEAL v. FIOR

Road Traffic—Vehicle owner—Charge of failing to give information as to identity of driver at time of offence—Burden of proof—First issue to be decided whether vehicle involved was owner's vehicle—Road Traffic Act, 1960 (8 & 9 Eliz. 2, c. 16), s. 232 (3).

Where a charge under s. 232 (3) of the Road Traffic Act, 1960, is brought against the owner of a vehicle, alleging that he has failed to give information as to the identity of the driver of the vehicle at the time of an alleged offence, and the owner disputes the fact that the vehicle was driven at the time and place alleged, justices must first decide the question whether they are satisfied, on the ordinary standard of proof applicable to a criminal case, that the vehicle involved was the owner's vehicle. If they are not so satisfied, the information should be dismissed, but, if they are so satisfied, they must next consider whether the owner has established, on the more limited standard of proof laid upon the defendant, that he did not know and could not with reasonable diligence have ascertained who the driver was.

CASE STATED by justices for the Inner London Area South Western Petty Sessional Division.

On Jan. 10, 1968, an information was preferred by the appellant, Kenneth Neal, against the respondent, Nicholas Fior, charging that he on Nov. 8, 1967, being the owner of a vehicle, the driver of which was alleged to be guilty of an offence to which s. 232 of the Road Traffic Act, 1960, applied, on Sept. 24, 1967, at Streatham High Road, London, S.W.16, he failed to give information as to the identity of the said driver when required so to do by or on behalf of the Commissioner of Police of the Metropolis.

On the hearing of the information at Balham Magistrates' Court on Feb. 28, 1968, the following facts were found: The respondent was on Sept. 24, 1967, the owner of a blue Ford Anglia motor car, registration number 420 HUC; a collision occurred between a Morris Minor motor car and another vehicle at 7.45 p.m. on Sept. 24, 1967, at Streatham High Road as a result of which the driver of that other vehicle was alleged to be guilty of an offence under s. 77 of the Road Traffic Act, 1960; the justices made no finding whether the other vehicle was the respondent's Ford Anglia; on Nov. 8, 1967, the respondent was required on behalf of the Commissioner of Police of the Metropolis to give information as to the identity of the driver of the Ford Anglia at Streatham High Road on Sept. 24, 1967, and there was served on him by the police a form

of application for the name and address of the driver; the respondent declined to complete the form, and stated that nobody was driving his vehicle at the time and place stated; he had earlier (on Oct. 16, 1967) stated to the police that at the time of the alleged collision he was at Woldingham, in the county of Surrey, and that at the relevant time his car was not at Streatham High Road. The justices made no finding whether the respondent was correct in his assertion made at the hearing in court that he and the car were at Woldingham at the relevant time and date.

They were of the opinion that they were not required to decide whether or not the respondent's motor car was involved in the collision at Streatham High Road at 7.45 p.m. on Sept. 24, 1967, nor whether the respondent and/or the car were at Woldingham at the relevant time and date; if the respondent was correct in his assertion that the motor car was at Woldingham at the time of the collision in Streatham High Road it followed that it was impossible for him to state who was driving the motor car at Streatham High Road at the relevant time; form 963 (requiring information as to the identity of the driver) was unsatisfactory, in that it made no provision for the person called on to give particulars to question the allegation that the vehicle was at the place and time alleged therein, nor did it make clear the obligation to use reasonable diligence to ascertain who was the driver; the respondent did not know and could not with reasonable diligence have ascertained who was the driver of the Ford Anglia motor car at Streatham High Road at 7.45 p.m. on Sept. 24, 1967, since it was his contention that the motor car was at Woldingham at the relevant time. The justices dismissed the information, and the prosecutor appealed.

D. H. Farquharson for the appellant.

J. W. Rogers for the respondent.

ASHWORTH, J.: This is an appeal by way of Case Stated from the dismissal of an information by the Balham justices which was preferred by the appellant against the respondent under s. 232 of the Road Traffic Act, 1960. It was alleged against the respondent that he on Nov. 8, 1967, being the owner of a vehicle the driver of which was alleged to be guilty of an offence to which s. 232 of that Act applies, on Sept. 24, 1967, at Streatham High Road, failed to give information as to the identity of the driver when required so to do by or on behalf of the Commissioner of Police of the Metropolis. Before setting out the facts on which the case was brought, it is convenient perhaps to look shortly at s. 232 to see what is provided. It is headed "Duty to give information as to identity of driver, &c., in certain cases". Subsection (1) states that this section applies to a number of offences of which s. 77 is one. Subsection (2) and sub-s. (3) provide:

"(2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies—(a) the owner of the vehicle shall give such information as to the identity of the driver as he may be required to give—(i) by or on behalf of a chief officer of police . . .

"(3) A person who fails to comply with the requirement of paragraph (a) of the last foregoing subsection shall be guilty of an offence unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle or, as the case may be, the rider of the bicycle or tricycle, was . . .".

If one stops there, one can quite readily imagine the set of circumstances which the Legislature had in mind. An accident occurs involving, as in this case, two motor vehicles, and one of them goes off; the driver is unknown and all that the

police manage to find out is the registration number of the vehicle. By checking with the local authority they can find who is the registered owner. Thereupon sub-s. (2) comes into play provided, of course, as in this case, the offence alleged against the driver is one to which sub-s. (1) applies. Thereupon the police come within sub-s. (2) because they are alleging that the driver of the vehicle in question is guilty of an offence to which this section applies. Having got so far, the Act imposes a duty on the owner of the vehicle, in the present case the respondent, to give such information as to the identity of the driver as he may be required to give. At that stage there have been no court proceedings, there is simply an allegation that the driver of the particular vehicle is guilty of an offence. That puts, by statute, a burden on the owner of the vehicle to give such information as he may be required to give as to the identity of the driver. Then comes the penal subsection:

"(3) A person who fails to comply with the requirement of paragraph (a) . . . shall be guilty of an offence unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who the driver of the vehicle . . . was . . .".

One can well imagine the sort of circumstances contemplated when that provision was inserted: a man's car may be stolen, it may be taken without his authority, and while it is being misused in that way there may be a collision, the number of the car is taken and the police find the registered owner and they serve the requirement on him. He is entitled under sub-s. (3) to say: yes, I am the owner of the vehicle, but I do not know and cannot with reasonable diligence ascertain who the driver was. If he satisfies the court on the limited burden of proof which falls on him to that effect, then he is not guilty of an offence. But if it comes to proceedings and the requirements have not been fulfilled, then as it seems to me the prosecution have initially the burden on them of proving that the vehicle whose owner is before the court was in fact involved in an offence to which the section applies. Having done that and having proved that the requirement was not met, then the burden falls on the owner if he can do so, to show that by no diligence could he have found out who the driver was. With that in mind one looks to see what happened here. The justices as I say at the outset appear to have been influenced by an unfortunate distaste for the form of the notice served on the respondent; because of that unhappy inference, in my judgment, they were misguided in their approach to the case. They found certain facts, but more importantly they failed to find the one that mattered.

In para. 2 (a) of the Case Stated they find that the respondent was the owner of a blue Ford Anglia registration number 420 HUC; in para. 2 (b) they find that a collision occurred at Streatham High Road between a Morris Minor and another vehicle as a result of which the driver of that other vehicle was alleged to be guilty of the offence of not stopping. Then comes this "We made no finding as to whether the said other vehicle was the [respondent's] said Ford Anglia motor car".

As this court has been informed and as must be obvious from the nature of things, there was some evidence before the justices to show that the other vehicle referred to in that paragraph was in fact 420 HUC. Paragraph 2 (c) refers to the requirement which I need not read. Paragraph 2 (d) states that:

"... the respondent declined to complete the said form, and stated that nobody was driving his said vehicle at the time and place stated. He had earlier (on 16th October, 1967) stated to police that at the time of the



alleged collision he was at Woldingham in the County of Surrey and that at the said time his car was not at Streatham High Road."

Then para. 2 (e) which was the second nettle which the justices declined to grasp, and the finding is as follows:

"We made no finding as to whether the [respondent] was correct in his assertion made at the hearing in court that he and the car were at Woldingham at the same time and date."

Accordingly, the situation on the facts found is that an unknown car was involved in a collision in Streatham High Road said to be the respondent's, and there is no finding one way or the other whether the respondent's answer to the requirement was true or not. Then they state their opinion:

"We were not required to decide whether or not the respondent's said motor car was involved in the collision at Streatham High Road at 7.45 p.m. on 24th September, 1967, nor whether the [respondent] and/or the car were at Woldingham at the said time and date."

With the utmost respect to these justices, those were the very two points which they had to decide if they were to determine this information properly. If after hearing the evidence they were not satisfied that the prosecution had discharged the burden of proving that 420 HUC was in Streatham High Road, then the information would be dismissed; on the other hand, if they were satisfied conversely on the limited burden of proof that the respondent was in Woldingham, equally the information would fail; but they made no finding one way or the other.

Paragraph 3 (b) of the Case Stated is, if I may say so, correct, but does not take the matter further. It says:

"If the respondent was correct in his assertion that the said motor car was at Woldingham at the time of the said collision in Streatham High Road it followed that it was impossible for him to state who was driving the said motor car at Streatham High Road at the said time."

Then they go to para. 3 (c):

"The said form 963 exhibit 1 is unsatisfactory, in that it makes no provision for the person called on to give particulars to question the allegation that the vehicle was at the place and time alleged therein, nor does it make clear the obligation to use reasonable diligence to ascertain who was the driver."

Then we come to para. 3 (d) on which counsel for the respondent, who has striven hard to uphold the justices' decision, relies. Paragraph 3 (d) starts with what looks like a finding of fact:

"The respondent did not know and could not with reasonable diligence have ascertained who was the driver of the said Ford Anglia motor car at Streatham High Road at 7.45 p.m. on 24th September, 1967, since it was his contention that the said motor car was at Woldingham at the said time . . ."

That is not, if I may say so, a finding of fact in any shape or form; indeed, from what I have read already, it was quite plain that the justices thought that they were not obliged to make any finding of fact on that issue, and secondly that they expressly abstained from doing so. Therefore all that para. 3 (d) comes to is that they took the view that because the respondent contended that his motor car was at Woldingham, then he could not with reasonable diligence have found out who was the driver of the car at Streatham. With all respect to them, it

just will not hold water. The essential thing in proceedings of this sort, contested as they were, is for the justices to decide whether the fundamental premise to the prosecution's case is made out, namely that the vehicle of which the respondent is the owner was in fact at the time and place mentioned there and that the driver was involved in an offence, and when they are deciding that issue they will, of course, consider the answer made by the respondent on the limited burden of proof laid on him, and they may well find that he is right, but they must make a finding one way or the other, and that they failed to do. The question which they ask is whether they came to a correct determination and decision in point of law; in my judgment the answer is no. Then they state:

"... if not the Court is requested to reverse or amend our said decision or remit the matter to us with the opinion of the Court thereof."

In my judgment the proper course is that this case should go back to the justices at Balham, although it might be preferable for the matter to be re-heard before a differently constituted bench, but I would allow the appeal.

WILLIS, J.: I agree.

LORD PARKER, C.J.: I agree with the order proposed. It seems to me that the first question for the justices to decide on a re-hearing is whether they are satisfied according to the ordinary standard of proof in a criminal case that the car involved in the collision at Streatham at the time in question was the respondent's car 420 HUC. If they are not so satisfied, there is an end of the case and the information is dismissed. If on the other hand they are so satisfied, then they must go on to consider the next question, whether, albeit it was the respondent's car that was there at Streatham at the time alleged, nevertheless he had shown on the limited burden of proof on him that he did not know and could not with reasonable diligence have ascertained who the driver was.

Case remitted.

Solicitors: *Solicitor, Metropolitan Police; Lucien Fior.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 23, 1968

R. v. KING'S LYNN JUSTICES. Ex parte CARTER AND OTHERS

Quarter Sessions—Committal for sentences—Jurisdiction of committing magistrates—“Character and antecedents”—Matters which may be taken into consideration—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 29.

The expression “character and antecedents” in s. 29 of the Magistrates' Courts Act, 1952, is intended to be extremely wide. When deciding whether or not to commit a defendant to quarter sessions for sentence magistrates are entitled to take into consideration not merely previous convictions and offences which the defendant asks to have taken into consideration, but also matters revealed in the course of the hearing connected with the offence charged which reflect in any way of the defendant's character.

MOTIONS by Barry Alan Carter, Frederick George Somerton, and Kenneth Alfred Whiley for orders of certiorari to remove into the High Court and quash orders made in respect of each applicant on Jan. 19, 1968, by King's Lynn Borough Magistrates' Court committing them to King's Lynn Borough Quarter Sessions for sentence under s. 29 of the Magistrates' Courts Act, 1952, after each applicant had pleaded guilty to the offence of being concerned together in stealing 489 ladies' garments of a total value of £3,476 8s. 6d., the property of their employers, Jaeger Co., Ltd. The applicants also applied for orders of prohibition directed to King's Lynn Borough Quarter Sessions to prevent them from sentencing the applicants on their committal.

J. C. C. Blofield for the applicants.

A. G. Don for the respondent.

LORD PARKER, C.J.: In the first six cases now before the court, counsel moves on behalf of three applicants, Carter, Somerton and Whiley, for orders in each case of certiorari to quash their committal to quarter sessions for sentence by King's Lynn Borough Magistrates' Court on Jan. 19, 1968, and for orders of prohibition directed to the King's Lynn Borough Quarter Sessions to prevent them from sentencing the applicants on their committal. These are cases which have given the court considerable anxiety having regard to the fact, as will appear in a moment, that these were cases which ought not to have been tried summarily by the justices.

The information alleged that the three applicants jointly being servants of Jaeger Co., Ltd. did steal 489 garments valued at almost £3,500 from their employers; that is an offence contrary to s. 17 (1) of the Larceny Act, 1916, and is quite clearly an extremely serious offence, carrying a heavy sentence. It is only possible for it to be dealt with summarily by reason of the fact that that section appears in Sch. 1 to the Magistrates' Courts Act, 1952, and, therefore, attracts the procedure laid down in s. 19 of that Act. Section 19 (1) provides that:

“The following provisions of this section shall have effect where a person who has attained the age of seventeen appears or is brought before a magistrates' court on an information charging him with any of the indictable offences specified in the First Schedule to this Act.”

Those offences, as is this one, are indictable offences only and do not come within the procedure laid down in s. 18, which is dealing with hybrid offences. Prima

facie, therefore, this is an offence triable only on indictment, and s. 19 (2) then goes on in this way:

"If at any time during the inquiry into the offence [as examining magistrates] it appears to the court, having regard to any representations made in the presence of the accused by the prosecutor or made by the accused, and to the nature of the case, that the punishment that the court has power to inflict under this section would be adequate and that the circumstances do not make the offence one of serious character and do not for other reasons require trial on indictment, the court may proceed with a view to summary trial."

The following subsections then deal with the procedure which is to be adopted; the charge is to be written down, the accused is to be asked whether he consents to it being dealt with summarily, and so on. He is then called on to plead, and the matter proceeds by way of summary trial. It is not altogether clear what happened in the present case. It may be, though this is denied, that the prosecution, as often happens in the interests of expedition, desired the justices to deal with this case summarily; at any rate at the very outset and without hearing the circumstances of the case, the justices agreed to deal with the case summarily and the applicants consented.

As I have said, this is a very serious charge, and it is very difficult to think how the justices could have felt that they had power to inflict punishment appropriate to the offence. If the applicants had good characters, the most that the justices could have done would have been to say: This is a case for six months' imprisonment, and thereupon, if they did not know it already, their clerk would inform them that, under s. 39 of the Criminal Justice Act 1967, that sentence had to be suspended. I would like to follow LORD GODDARD, C.J., in his directions in a number of cases in the past, that justices must not deal with cases which are serious cases of this nature, which can only properly be tried on indictment. I am afraid that the fault is very often the fault of the prosecution, who, as I have said, no doubt in the interests of expedition, invite justices to deal with these very serious offences summarily.

In my judgment, in the present case the justices, if they applied their minds to the charge, could not properly have agreed to try it summarily. If they had any doubt in the matter, they should have allowed the inquiry to proceed, and if it turned out in the course of the inquiry that despite the serious nature of the charge, as it appeared in the information, it was not as serious as it in fact appeared, then, at any stage of that inquiry as examining magistrates, they could decide, with the consent of the applicants, to deal with the case summarily. As I have said, that did not happen in this case. The decision was made at the very outset and, indeed, as will appear in a moment, if they had proceeded to inquire into the case as examining magistrates, the circumstances would have shown that this case was far more serious than the bare words of the information would reveal. The applicants pleaded guilty; the respondent stated the facts; those facts revealed an appalling state of affairs; and the justices, at the end, realised that the appropriate sentence was not within their limited powers and they thereupon committed the applicants to quarter sessions under s. 29 of the Magistrates' Courts Act, 1952.

The point raised in these six motions concerns the question whether the justices had power to commit in all the circumstances. Section 29 provides as follows:

"Where on the summary trial under subs. (3) of s. 18 or s. 19 of this Act of an indictable offence triable by quarter sessions a person who is not less than seventeen years old is convicted of the offence, then,

if on obtaining information about his character and antecedents the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, instead of dealing with him in any other manner, commit him in custody to quarter sessions for sentence . . ."

The case for the applicants is simple. They say: our characters and antecedents were impeccable. To take as an illustration the applicant Carter: he was twenty-four years of age, married, living with his wife; he commenced work as a store-keeper for a garment manufacturing firm in 1958 at the age of fifteen, has been in constant employment, has bettered himself, and had been with Jaegers since January, 1963. There were no previous convictions at all. Accordingly, says counsel, there was nothing revealed in his character and antecedents which resulted in the fact that greater punishment should be inflicted for the offence than the court had power to inflict.

No one has ventured to lay down, and I do not think that this court would venture to lay down, exactly what is comprised in those words "character and antecedents"; they are wide words, and the furthest it can be said to have gone at the moment is shown in *R. v. Vallett* (1). According to the headnote, the character and antecedents of the offender mentioned in s. 29 (1) of the Criminal Justice Act, 1948, were not limited to previous convictions, and, therefore, the justices had power to commit the appellant for sentence. In that case the appellant, a woman, had been convicted of four cases of larceny, and she asked for ninety-six outstanding offences to be taken into consideration. LORD GODDARD, C.J., in giving the judgment of the court, then the Court of Criminal Appeal, said this:

"It is not necessary to enter into a discussion whether 'character' means general reputation. It certainly, in my opinion, relates to something more than the fact that a person has been previously convicted, and the word 'antecedents' is as wide as can be conceived. On considering the appellant's antecedents it was found that she was a married woman living with a man who was not her husband, that she had been put in a position of trust, and that she had used the information she had so obtained to carry out persistent and wholesale thefts. It seems to the court that, having those antecedents before them, the justices were entitled to use their powers under s. 29 (1). If the legislature had intended to limit the powers given by s. 29 (1) to cases where the defendant had been previously convicted, I think the words would have been: 'If, on obtaining information as to his previous convictions . . .'. Parliament, however, has used wider words—'character and antecedents'. The character and antecedents of the appellant show that she has been a shameless thief for a long period of time and in these circumstances we consider that the justices had power to commit her to quarter sessions. It cannot be said that a sentence of two years for the offences committed is excessive, and the appeal is dismissed."

It is to be observed there that, while ninety-six other offences were to be taken into consideration, the words used by LORD GODDARD, C.J., do not limit the power to commit under s. 29 to the case where there are previous convictions or offences taken into consideration. Indeed, his judgment is on the basis that the justices were entitled to commit once it had been shown that she had been a shameless thief over a long period, and also that she had committed those thefts while in a position of trust.

In the present case, what was revealed in the case of the applicants Somerton and Whiley, who had no previous convictions, can be seen from their own statements to the police. They there each of them confessed to a long series of thefts beginning in October, 1967, and continuing until they were caught on Jan. 10, 1968. Their account of what they did and the part they played was clearly evidence against each of them, and revealed a shocking fraud. They gave an account of how they were approached by the applicant Carter, who was in a position just under the supervisor, whereas they were cleaners employed by the company, and how they at his request became involved in these thefts by taking bags of clothing, ladies' jumpers and the like, concealed in a rubbish carton covered over with newspaper, their duty being to remove the rubbish to a rubbish bay. They then took these cartons with the bag inside to the rubbish bay, and, at a convenient opportunity, having been given the key of the boot of the applicant Carter's car, would remove the bags into the boot of his car. It seems to me quite clear that, although they had no previous convictions and did not ask for any offences to be taken into consideration, in each of their cases their conduct over this long period was something which the justices were entitled to take into consideration as reflecting on their character and antecedents.

The applicant Carter, as one would expect, denied that he had been guilty of these offences over a long period; he only admitted to the taking away of five bags of clothing in a very short period of time, both on the Friday and the Monday preceding the Wednesday when he was caught red-handed. On the other hand, the prosecution case as outlined by the respondent was made on the basis that this was a most serious case, not a case of pilfering by employees to meet their own personal needs, but a case of organised stealing on a large scale by persons employed in a position of trust, and it described the applicant Carter's position, second to the supervisor at the warehouse, and the part it was alleged he had played. It was also suggested by the respondent that Jaegers, the employers, for a long time had suspected substantial loss of garments, and it was as the result of their complaints that the police kept observation. There again, these are matters as it seems to me arising from the circumstances of the case which clearly reflect on the applicant Carter's character. The justices were fully entitled to say: we do not accept the applicant Carter's statement that he only did it on the Friday, Monday and Tuesday; we take the view that the respondent is right, that this was a series of thefts which had been going on for a long time, organised by a man in a very responsible position, and in a position of trust, in the course of which he had corrupted two underlings in the form of the applicants Somerton and Whiley, mere cleaners employed by the company. Once the justices were entitled to and did accept that position, then there were matters connected with the offence which reflected on his character and antecedents and would justify a committal.

As I see it, speaking for myself, the expression "character and antecedents" being as wide as it possibly can be, justices are entitled to take into consideration in deciding whether or not to commit, not merely previous convictions, not merely offences which they are asked to take into consideration, but matters revealed in the course of the case connected with the offence charged which reflects in any way on the defendant's character. Of course, in the ordinary way where justices do their duty under s. 19 (2) of the Act of 1952, the circumstances of the offence which reflect on character and antecedents will already have emerged, and if, notwithstanding that, the justices decide to deal with the case summarily, they cannot take those matters into consideration again when they are considering committal under s. 29; there must be something more than has

been revealed at the stage when they decided to deal with the case summarily. On the other hand where, as in the present case, they have either been persuaded to deal with the case summarily, or have embarked on the summary trial without making any proper inquiry, or without conducting their inquiry as examining magistrates far enough to understand the nature of the case, then, as it seems to me, they are fully entitled to take into consideration those matters relating to the offence which had been revealed at the trial and which do reflect on the character and antecedents.

Accordingly, and I confess that I am glad so to hold, I think that the justices did have sufficient material to make a valid committal in the case of each of these three applicants to quarter sessions, and, accordingly, I would dismiss the motions.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Motions dismissed.

Solicitors: *Jagues & Co.*, for *Hawkins, Ferrier and Newnes*, King's Lynn; *Wilberforce Allen*, for *Pounder, Brown & Gethin*, King's Lynn; *Kenneth Brown, Baker Baker*, for *Kenneth F. M. Bush & Co.*, King's Lynn.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.J.J.)

October 25, 1968

R. v. ALLAN

Criminal Law—Trial—Summing-up—Standard of proof.

A summing-up is not open to appeal on the ground of misdirection or non-direction if it is brought home to the jury that they must be sure of the guilt of the defendant before they convict.

APPLICATION by Raymond Augustus Allan for leave to appeal against his conviction at the Central Criminal Court of assault occasioning actual bodily harm when he was sentenced to twelve months' imprisonment.

A. F. Waley for the appellant.

A. D. Green for the Crown.

FENTON ATKINSON, L.J., delivered the following judgment of the court: In January, 1968, at the Central Criminal Court the applicant was convicted of an assault occasioning actual bodily harm. His brother Colin was also convicted on that count. There was a further count charging the applicant, his brother Colin and a Mr. Puckerin with robbery of the same victim. All three were on that count acquitted, and Mr. Puckerin was also acquitted on the second count of assault.

The facts shortly were that there was a Mr. Ezekial, who used to repair electrical equipment from time to time. On Apr. 8, 1967, just before noon Mr. Puckerin had arrived and was involved in some argument with Mr. Ezekial about some repairs to a television set of his. Mr. Ezekial's evidence was that while Mr. Puckerin was there talking to him, two other men came in, whom he identified as the two brothers, the applicant and his brother Colin. He said that he had had

some previous dealings with them indirectly, in that he had repaired a television set for the applicant's wife. He had charged her £28, he had only been paid a part of that sum, and there was some argument as to the satisfactoriness or otherwise of the repairs. His evidence was that the applicant and his brother entered the room and that they attacked him, assisted, as he thought, certainly by Mr. Puckerin, and he claimed also that they not only assaulted him, but that they took a wallet from his pocket and removed the money. In fact, they were acquitted on that charge; the jury were not satisfied on that count of robbery, but the applicant and his brother were convicted of the assault.

Undoubtedly Mr. Ezekial had suffered injury. He was taken to hospital, and he was found to have a two-inch laceration on the back of his head, and there was some suspicion of a crack to the back of his skull. There was police evidence that when the applicant was interviewed and asked whether he had been there at the time he said: "I was not there, I was with my brother all day." He refused to say where he had spent the day, but he did say that he and his brother had been together. Towards the end of the interview when the applicant was being led out of the room, he saw his brother Colin and shouted to him: "Don't tell these white trash anything. We weren't at home all day." When Colin Allan was questioned, he took just the same line as the applicant: he had never heard of Mr. Puckerin; he did not know Mr. Ezekial; they had not been there; he had been with the applicant all day. Mr. Puckerin, when he was interviewed, admitted that he had been there at the time; denied he had taken any part in assaulting or robbing Mr. Ezekial; and made a long voluntary statement saying that the applicant and his brother alone were the ones who attacked Mr. Ezekial; and that he had seen them, as he put it, "work the television man over".

The jury were, of course, warned—and properly warned—that what Mr. Puckerin said to the police in the absence of his co-accused was no evidence against them. That, shortly, was the state of the evidence, with this additional feature, that Mr. Ezekial was in fact cross-examined on the lines that the applicant and his brother had been present on the occasion in question, which, of course, was quite contrary to what they had told the police.

When the time came no evidence was given by any of the defendants, so that the jury had the uncontradicted evidence of Mr. Ezekial that he had been assaulted in this way; and there was the material before the jury to conclude from the cross-examination that both the applicant and his brother had lied to the police about their movements that day. Very lengthy grounds were submitted by the applicant himself, which, incidentally, say he was there, and claiming that it was Mr. Puckerin who attacked Mr. Ezekial and that he and his brother took no part in it at all. But the only point now taken—and it arose at first on the application to this court for leave to appeal against conviction and sentence, when leave to appeal against sentence was refused and the application for leave to appeal against conviction was adjourned—is as to the direction given by the commissioner as to the standard of proof in a criminal case.

This point has arisen very many times in this court. In his direction to the jury the Commissioner told them that it was for the prosecution to prove their case, it was not for the defence to prove anything; that the prosecution had to satisfy them—and he used the word "established" on one or two occasions—and he said that the prosecution had to establish the charge to the jury's satisfaction, and they had to be satisfied before they could convict.

It has been said in cases a good many times—and it is not necessary to cite them—that merely to say that the jury must be "satisfied" without any clear indication of the degree of satisfaction required is an inadequate direction. But

equally it has been said a good many times that it is not a matter of some precise formula or particular form of words being used. The important question is whether the direction as a whole was such as to bring to the minds of the jury that they must be sure of the guilt of the accused.

A recent unreported case where this has all been gone into at some length is *R. v. Whiteshaw and Amos*, (1) heard in this court on Dec. 20, 1966. The substance of the direction in that case was in this form:

"It is the duty of the prosecution to prove their case. They have to establish their case, and neither of these accused men need prove anything at all. You will only convict either of them if you are satisfied that the prosecution has proved its case."

The court after due consideration held that that was not a misdirection or a non-direction. The words in that case are virtually indistinguishable from those in the present case. But it is not a matter of the precise words used by the Commissioner on this occasion. In the view of this court, the direction that he gave did sufficiently bring home to the minds of the jury that they must be sure about any charge before they convicted; and that being so, there is no ground for granting the application. But, in fact, on the state of the evidence in this case, Mr. Ezekial's evidence standing uncontradicted, this court (if it had arrived at a different decision) would have had no hesitation in applying the proviso to s. 2 (1) of the Criminal Appeal Act, 1968.

Application refused.

Solicitors: *Registrar of Criminal Appeals; Metropolitan Police Commissioner.*

T.R.F.B.

(1) Unrep. Dec. 20, 1966.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ. AND O'CONNOR, J.)

October 25, 1968

R. v. LAMB (THOMAS)

Criminal Law—Indictment—Committal for trial for non-existent offence—Further counts, one for non-existent and one for existing offence, added—Counts for non-existent offences quashed—Trial on added count relating to existing offence—Validity of conviction—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 Geo. 5, c. 36), s. 2 (2), proviso (i).

The appellant was committed for trial on a charge of unlawfully and maliciously shooting at X on Jan. 21, 1968, with intent to resist lawful arrest, contrary to s. 18 of the Offences against the Person Act, 1861. The indictment when drawn included also: (a) a further count under s. 18, describing the offence in the same terms, except that the intent was described as "to do X grievous bodily harm or to maim, disfigure or disable him"; and (b) a count for using a firearm with intent to resist lawful apprehension, contrary to s. 23 of the Firearms Act, 1937. The trial judge quashed the count which reproduced the committal charge and also the added count (a), in view of the fact that as from Jan. 1, 1968, these offences had been rendered non-existent by reason of amendments made to the Act of 1861 by s. 10 (2) of and Sch. 3 to the Criminal Law Act, 1967, but directed that the trial on the added count (b) should proceed, and the appellant was convicted on that count.

HELD: the committal was a nullity as being for a non-existent offence; no charge could validly be attached to such a nullity under s. 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, proviso (i), so as to be itself a charge properly included in the indictment; and, therefore, the conviction must be quashed,

APPEAL by Thomas Lamb against his conviction at Nottingham Assizes of using a firearm with intent to resist lawful apprehension, contrary to s. 23 of the Firearms Act, 1937.

J. R. Hopkin for the appellant.

K. Mattheuman for the Crown.

WIDGERY, L.J., delivered the following judgment of the court: The appellant was convicted in March, 1968, at Nottingham Assizes of using a firearm to resist lawful apprehension, and he was sentenced to eighteen months' imprisonment and an ancillary order was made with relation to forfeiture of the gun and ammunition. The offence alleged was said to have occurred on Jan. 21, 1968, when the appellant was poaching. He was surrounded by three or four gamekeepers, he had a gun in his hand and he fired the gun, though he said that it was into the air, and no one was injured as a result.

He comes before this court appealing against his conviction on a point of law, which arises in this way. Before the justices in the committal proceedings, the only charge on which he was committed was one laid under s. 18 of the Offences Against the Person Act, 1861, in these terms:

"for that he on the 21st day of January, 1968, at Welbeck in the County of Nottingham, unlawfully and maliciously did shoot at Philip Longden, with intent to resist lawful arrest, contrary to Section 18 of the Offences Against the Person Act, 1861."

When he had been committed on that charge the indictment was prepared, and it included a further charge under s. 18 in similar terms, except that the intent there described was "to do him grievous bodily harm or to maim, disfigure or disable him"; and, in addition, there was included the charge under s. 23 of the Firearms Act, 1937, on which he was ultimately convicted. When the matter came before the trial court, the learned trial judge had himself observed that s. 18 of the Offences Against the Person Act, 1861, had been amended in material form since Jan. 1, 1968. The amendment is contained in Sch. 3 to the Criminal Law Act 1967, which makes the following repeal in s. 18. I read the words of the schedule:

"In section 18 the words from 'or shoot' to 'some other', except the words 'with intent to do some'."

That repeal, when related to the wording of the original s. 18, has the effect that shooting at a person with the intent laid in the first count of this indictment is no longer in itself an offence at all. When this fact was pointed out by the learned judge to counsel, they accepted that there was no alternative but for him to quash the first two counts, since they related to offences not existing as offences at the date when they were alleged to have been committed. But no one then applied his mind to the point which is raised in this appeal, namely, that, if the charge in respect of which the committal had occurred was struck out on the footing that it disclosed no existing offence, then the indictment containing the third count relating to the Firearms Act, 1937, was itself defective.

The argument in this court, put very briefly is in this form. By s. 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, it is provided that:

"Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—(a) the person charged has been committed for trial for the offence; or (b) the bill is preferred by the direction or with the consent of a judge of the High Court . . . Provided that—(i) where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment; . . ."

The argument runs thus: the appellant was never committed for trial in respect of the firearms offence, nor can the prosecution rely on the proviso, because, although it may well be that the firearms offence could properly have been joined with the offence on which he was committed, it is said that he has never been validly committed for trial at all because the offence on which the justices purported to commit him was an offence which at all material times was not known to the law. Counsel for the Crown accepts that this is an insuperable defect in the proceedings. We are satisfied that the submission on behalf of the appellant is right, that the alleged committal was a nullity because it was in respect of a non-existent offence; and, that being the case, the charge on which he was convicted could not properly be attached to that nullity so as to be itself a charge properly included in the indictment.

Accordingly, the appeal is allowed and the conviction is quashed.

Conviction quashed.

Solicitors: *Registrar of Criminal Appeals; Hodding & Wordsworth, Worksop.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 28, 1968

HOYLE v. WALSH

Road Traffic—Driving with blood-alcohol portion above prescribed limit—Specimen of blood—Validity of arrest—Breath test—Failure to give specimen of breath—Defective equipment—Road Safety Act, 1967 (c. 30), s. 1 (1), s. 2 (1), (5).

By s. 2 (5) of the Road Safety Act, 1967: "If a person required by a constable under sub-s. (1) or (2) of this section to provide a specimen for a breath test fails to do so . . . the constable may arrest him without warrant . . ."

Where defective equipment for a breath test has been provided, inability to provide a specimen of breath for that reason is not a failure to do so within the meaning of the aforementioned subsection. Failure denotes that the defendant has failed to do something which was possible.

CASE STATED by Rossendale (Lancaster) justices.

On Mar. 18, 1968, informations were preferred by the respondent, Arthur Walsh, against the appellant, Amy Hoyle, charging that she at Haslingden, in the county of Lancaster, at 11.50 p.m. on Monday, Feb. 19, 1968, did drive a motor vehicle, namely, a Morris Oxford saloon car, registration number

738 BWW, in Blackburn Road and (a) did fail to provide a specimen of breath for a breath test there or nearby to a police constable in uniform, contrary to s. 2 (1) of the Road Safety Act 1967; and (b) having consumed alcohol in such a quantity that the proportion thereof in her blood, namely, 196 milligrammes of alcohol in one hundred millilitres of blood, exceeded the prescribed limit, contrary to s. 1 (1) of the Road Safety Act 1967.

On the hearing of the information at Rawtenstall Magistrates' Court on Apr. 18, 1968, the following facts were found. At 11.50 p.m. on Monday, Feb. 19, 1968, the respondent, a member of the Lancashire county constabulary, was on duty in Hud Hey Road, Haslingden, when he saw a Morris Oxford car which was being driven by the appellant. The respondent observed the driving of this car for some time, and not being satisfied therewith he stopped the vehicle and informed the appellant of his observations in respect of her driving. She spoke to him, and he observed that her breath smelt strongly of alcohol and her speech was slurred. He came to the conclusion that she was driving the car with an amount of blood alcohol in her blood stream exceeding the statutory limit. He asked her to supply him with a specimen of breath and she agreed to do so. He produced to her an Alcotest breathalyser. The appellant attempted to blow air through the mouthpiece into the bag of the breathalyser. She had difficulty in inflating the bag. At the second or third attempt to do so, the bag of the breathalyser came away from the mouthpiece. The respondent replaced the mouthpiece and the appellant attempted to inflate the bag again but without succeeding. At one time or another a small amount of air had been blown into the bag of the breathalyser. This was sufficient to colour the chemical substance therein, but not to such an extent as to indicate that there was an excessive amount of alcohol in her blood. The respondent arrested the appellant for failing to produce a specimen of breath for a breath test without reasonable excuse. She accompanied him to Rawtenstall police station. At 12.15 a.m. on Tuesday, Feb. 20, 1968, the appellant was asked if she wished to take a second Alcotest and she agreed to do so. However, she again had difficulty in inflating the bag which was only one quarter full. The respondent then gave the appellant the statutory caution and asked her to provide a blood sample or urine sample. She agreed to give a test sample of blood. Dr. Lamberty, the police surgeon, arrived at the police office at 1.30 a.m. With her consent he took a specimen of blood from her thumb. He did this through the means of a prick in the thumb, from which he took three different samples of blood. The police officer handed to Dr. Lamberty a pack used in connexion with this type of test. This pack consisted of a small tin which contained three capsules, a number of tags identifying the samples and a label to attach to the lid of the container when the sample had been taken. Dr. Lamberty filled the three capsules with the samples of blood taken, completed the labels for identification, attached them to the capsules, placed one of the three capsules into the tin container, sealed that container, attached to the lid thereof the label supplied, which he had previously completed, and handed the sealed tin to the respondent. In cross-examination, the doctor stated that there were crystals in each of the capsules. He said that these crystals were anti-coagulants and were placed in the capsules to prevent the blood from clotting. When pressed, he stated that he did not know of his own knowledge that the crystals were anti-coagulants, nor had he put the crystals in the capsules. He had been informed that they were and always assumed that they were. He did not analyse the crystals himself but he had observed that the blood had not, in fact, clotted. He admitted that he would not know if some of the crystals in the capsule had contained alcohol and could not know that unless he had analysed

the crystals. He therefore admitted that it was possible for certain crystals to contain alcohol and if the crystals in question in the capsules had, in fact, contained alcohol the ostensible alcoholic content of the blood would be increased. He further admitted that if one had a specimen of human blood to which a soluble substance was added, it would be a specimen of human blood with an unknown substance in it.

The respondent administered the statutory warning to the appellant prior to the taking of the sample of blood and, after the sample had been taken, handed to her a capsule containing one sample of the blood taken. He caused the sealed container handed to him by Dr. Lamberty to be posted by the police authority, in the ordinary course of post, by recorded delivery to the director of the forensic science laboratory at Preston, and produced a recorded delivery receipt in respect thereof. Mr. Herbert Bamford, the analyst employed at the forensic science laboratory who dealt with this matter, stated that he had received the sample of blood and produced the container and this sample. This sample had been identified by the tag attached thereto which was completed by Dr. Lamberty but never put to Dr. Lamberty or the respondent for identification nor identified by them. Mr. Bamford stated that he had not opened the post at the laboratory on the morning that this capsule was received. Someone had put the container on his desk during the course of the day. He stated that the actual figure which he obtained in analysing the blood was 209 milligrammes of alcohol in one hundred millilitres of blood. He had subtracted a figure of thirteen to make the alleged alcohol content of 196 milligrammes. He did this to allow for individual variations in technique used in analysis. In cross-examination, he stated that he had analysed the sample in question in such a way that he knew there was nothing other than alcohol affecting the result which he had given. The equipment used showed the alcoholic content of the blood sample and would also show any other volatile content in the blood. If the content in the blood was not volatile, the analysis would not be affected so far as the alcoholic content were concerned. The capsules used by Dr. Lamberty would be issued from the forensic science laboratory for the purpose for which they were used by Dr. Lamberty. There would be two substances already in each capsule. One would be an anti-coagulant and the other would be a preservative. He did not test in this particular case to see if other substances were present. Re-examined, he stated that he had never tested any sample of blood for the presence of anti-coagulants or preservatives. It was within his knowledge that those capsules issued by the forensic science laboratory at Preston did contain a preservative and an anti-coagulant. He stated that he had not tested the particular anti-coagulant and preservative substances contained in the particular capsules used by Dr. Lamberty on this occasion.

It was contended on behalf of the appellant that: On the facts shown, the appellant could not be guilty of the first charge of failing to give a specimen of breath without reasonable cause. She had, in fact, been quite willing to give a specimen of breath, but had not physically been able to do so. The bag had become detached from the mouthpiece of the breathalyser equipment and it could be that the equipment itself was defective. A small quantity of air had percolated the chemical substance which was present to test for alcohol, which showed that the appellant had attempted to perform the test. The appellant was not at this stage called on to show the court why she had failed to perform the test. There was no evidence before the court to say that she was guilty of failing to give a specimen of breath without reasonable excuse; there was no evidence to support the second charge of having consumed alcohol to such a

degree as to exceed the prescribed statutory limit. This submission was made on three grounds: (i) When a specimen of blood or urine was taken from a prospective defendant, in any case relating to an excess of alcohol, sub-s. (8) of s. 3 of the Road Safety Act 1967, made the provisions of s. 2 of the Road Traffic Act, 1962, applicable to the procedure to be adopted. It was provided by that subsection that evidence of the proportion of alcohol found in the specimen should not be admissible on behalf of the prosecution unless the specimen was one of two taken or provided on the same occasion or was part of a single specimen which was divided into two parts at the time it was taken or provided and the other specimen or part was supplied to the accused. It was contended that Dr. Lamberty had not complied with the statutory procedure. He had taken three separate specimens of blood, from the same puncture on three separate occasions, in that he had drawn blood from the same puncture three separate times in succession. Therefore, the specimen taken could not be one of two taken on the same occasion, or part of a single specimen which was divided into two parts at the time it was taken. Accordingly, it was submitted that Dr. Lamberty's evidence relating to the taking of a specimen of blood was inadmissible. There must be strict compliance with the procedure laid down by statute. (ii) There was no proof before the court that the crystals contained in the capsule used by Dr. Lamberty when forwarding that particular blood sample to the forensic science laboratory were, in fact, anti-coagulants or preservatives. It was possible that these crystals could have contained alcohol or, alternatively, could have contained any other substance which would render an analysis of the blood sample unreliable, and that it would have been a simple matter to provide a whole analysis, like for example in an adulterated milk prosecution. (iii) There had been a defect in the chain of evidence proving the transmission of the blood sample from Dr. Lamberty to the analyst himself and identifying it. The container and sample had never been identified by Dr. Lamberty and the respondent as the sample and container they had taken and despatched. The respondent had not posted the sealed container himself; the analyst had not himself collected the container on delivery by the general post. The chain of evidence must be strictly proved.

The justices were of the opinion that: with regard to charge no. 1, they did not feel that they could find on the evidence before them at that stage that the appellant could have been stated to have failed to provide a specimen of breath without reasonable excuse. The evidence showed that she was willing to supply a specimen of breath. The justices noted that the mouthpiece had become detached from the bag of the breathalyser equipment. There was some suggestion, that this was because of the physical condition of the appellant who was incapable of inflating the bag because of an excess of alcohol. However, the justices had no evidence before them as to this and felt that there was a possibility of the equipment itself being defective. They also felt that they ought to give the benefit of this doubt to the appellant. They therefore dismissed this charge. With regard to the submission relating to the second charge: (i) The justices considered that the provisions of s. 2 of the Road Traffic Act, 1962, were intended entirely for the protection of the defendant in any such case, and were to give such a defendant the opportunity of having the result of the blood specimen tested on her behalf. The fact that three specimens were taken on this occasion did not in any way abrogate the appellant's right to have a specimen of blood given to her and, in fact, the evidence showed that such a specimen was given to her for the purposes intended by the section of the Act in question and she herself could have the specimen analysed. (ii) With regard to the substances contained in each of

the capsules, they took note that these capsules were produced for the forensic science laboratory for the purposes of s. 1 of the Road Safety Act 1967, and that to the personal knowledge of the analyst, Mr. H. Bamford, each of these capsules contained a crystal of an anti-coagulant substance and a crystal of preservative substance. The fact that there were crystals of anti-coagulant substance in the capsules was shown by the evidence of Dr. Lamberty to the effect that there was no clotting in any of the blood samples taken by him. They had no reason to suppose but that the crystals in question were of substances regularly contained in capsules supplied for this purpose. There was nothing in the evidence of Dr. Lamberty or of Mr. Bamford to indicate the contrary and they felt that had there been any ground for this suggestion, any such ground would have been put by the appellant's solicitor to either Dr. Lamberty or Mr. Bamford. The appellant's solicitor appeared to imply that, in every case of this kind, specific evidence should be before the court that the crystals contained in each capsule were of such a substance as not to render the subsequent analysis defective. This would involve the evidence being given by the person who actually prepared the crystals, by the person who actually placed these crystals into the capsule in question, by the person who despatched the capsules to the forensic science laboratory, by the person who actually supplied these capsules on behalf of the laboratory to the Lancashire county constabulary, and by the person who transmitted these particular capsules to the police office at Rawtenstall. Alternatively, if they were to accept the submission of the appellant's solicitor, the police surgeon who, in each case proposed to take a specimen of blood, had first to analyse each of the substances in each capsule to ensure that they contained nothing but anti-coagulant and preservative substances. This seemed to them to be a *reductio ad absurdum* and they could not conceive that the prosecution should be called on to provide evidence of this kind. (iii) With regard to the transmission of the capsule through the ordinary course of post, they were satisfied on the evidence before them that Dr. Lamberty had properly identified the capsule in question, had placed it in a container which he himself sealed and to which he attached an identificatory label. They were satisfied that this particular container was posted on behalf of the Lancashire Constabulary at Rawtenstall and that the sealed tin was placed intact on the desk of Mr. Bamford, the analyst, for his personal attention. Accordingly, they found that Mr. Bamford had analysed the particular specimen of blood taken from the defendant by Dr. Lamberty.

In view of these findings, the justices dismissed all the submissions made in respect of the second charge by the appellant's solicitor. The appellant's solicitor then proffered no further evidence to them.

The justices found the appellant guilty of the charge of having consumed alcohol in such a quantity that the amount thereof in her blood exceeded the prescribed statutory limit.

The appellant appealed against her conviction of the offence under s. 1 (1) of the Road Safety Act 1967.

D. E. Hill-Smith for the appellant.

N. R. King for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county of Lancaster sitting at Rawtenstall who convicted the appellant of an offence contrary to s. 1 (1) of the Road Safety Act 1967, in that whereas the prescribed limit of alcohol in the blood is, under that Act eighty milligrammes of alcohol in one hundred millilitres of blood, the appellant was found on an analysis of a blood specimen to have no less than 196 milligrammes of alcohol in one hundred millilitres of blood.

What happened quite shortly was that just before midnight on Monday, Feb. 19, 1968, the respondent, a police constable on duty at Haslingden, saw a Morris Oxford car which was being driven by the appellant; he kept the car under observation, and not being satisfied with the driving he stopped the vehicle and spoke to the appellant. According to him, her breath smelt strongly of alcohol and her speech was slurred. Thereupon he asked her to supply him with a specimen of breath and produced an Alcotest breath test device. No point is taken, but it is conceded that the Alcotest breath test device was a form of equipment approved by the Secretary of State for the Home Department for the purpose. Pausing there, everything so far was clearly, as it seems to me, within the powers of the constable; s. 2 (1) of the Act of 1967 provides that:

"A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; . . .".

The appellant stated that she was perfectly willing to give a specimen of breath and tried to do so, but failed. The respondent then arrested the appellant for failing to produce a specimen of breath, took her to the police station, and gave her an opportunity of a further breath test. That she agreed to undergo, but again she failed to inflate the bag. It was in those circumstances that two charges were preferred against the appellant, the first for an offence contrary to s. 2 (3) which provides:

"A person who, without reasonable excuse, fails to provide a specimen of breath for a breath test under either of the two foregoing subsections shall be liable on summary conviction to a fine not exceeding £50"

and, secondly, for the offence of which she was convicted, namely an offence contrary to s. 1 (1).

What happened afterwards at the police station was that the appellant was asked to provide a specimen of blood or urine; she elected to give a specimen of blood; she was cautioned, and a police doctor thereupon came along and took specimens. The matter was argued before the justices on a number of somewhat technical points relating to the taking of the specimen of blood and the analysis of the specimen. The case, which was heard on Apr. 18, 1968, was before the decision in this court in *Scott v. Baker*, (1) and before this court counsel for the appellant has taken a further point, a point of considerable substance based on the decision of this court in *Scott v. Baker* (1). While it is a new point not taken before the justices, this court has thought fit to allow counsel to take it as it does not involve any fresh evidence or new facts other than those found by the justices. The submission is made in this way: in *Scott v. Baker* (1) this court held that before a person can be convicted of an offence against s. 1 (1), it must be shown that the specimen of blood which was analysed was a specimen of blood taken under s. 3 (1). Section 3 (1) provides, so far as it is material, that a person who has been arrested under, amongst other things, the last foregoing section, s. 2,

" . . . may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station . . ."

Accordingly, one then has to consider whether the appellant, from whom the specimen of blood was taken, had been validly arrested. The power of arrest in



the case of a defendant who has failed, when required, to give a specimen of breath is to be found in s. 2 (5). That provides that:

"If a person required by a constable under subsection (1) or (2) of this section to provide a specimen of breath for a breath test fails to do so and the constable has reasonable cause to suspect him of having alcohol in his body, the constable may arrest him without warrant except while he is at a hospital as a patient."

It is quite clear that the constable was satisfied in his own mind that the appellant had failed, though willing, to give a specimen of breath, because she was so intoxicated that she could not, and that that was so both at the roadside and at the police station, and of course, if that were so, there is no doubt that she was validly arrested, and that the condition precedent to the taking of a specimen under s. 3 was fulfilled, and accordingly that the offence here was fully made out.

The difficulty about this in the present case arises because on the first charge, that is a charge under s. 2 (3), the justices did not take the view which the respondent had clearly formed. In effect they dismissed that first charge, saying this:

"With regard to charge no. 1, we did not feel that we could find on the evidence before us at that stage that the [appellant] could have been stated to have failed to provide a specimen of breath without reasonable excuse. The evidence showed that she was willing to supply a specimen of breath. We noted that the mouthpiece had become detached from the bag of the breathalyser equipment. There was some suggestion that this was because of the physical condition of the [appellant] who was incapable of inflating the bag because of an excess of alcohol. However, we had no evidence before us as to this and felt that there was a possibility of the equipment itself being defective. We also felt that we ought to give the benefit of this doubt to the [appellant]. We therefore dismissed this charge."

In other words, the justices were saying: the prosecution have not satisfied us so as to make us feel sure that the equipment that was tendered by the respondent for the breath test was in proper working order.

It is to be observed that the power of arrest under s. 2 (5), unlike the offence created in s. 2 (3), is stated to be a failure to provide a specimen of breath simpliciter, not a failure to provide a specimen of breath without reasonable excuse, and it has been argued here by counsel for the respondent, that here, for whatever reason, even if the equipment was not in working order, there has been a failure to give a breath test, and accordingly the respondent was entitled, even on that view, to arrest the appellant. For my part I find great difficulty in construing the words "failed to do so" in such a wide manner as to cover that situation. If I understand it right, counsel would concede that if, for instance, the respondent required a specimen of breath and could not produce a breathalyser at all, while it might be said there had been a failure in the sense that no specimen of breath had been given, the respondent would not be entitled to arrest the appellant. He claims, however, that if equipment is provided, even if it is not in working order, there has in a true sense been a failure to give a specimen of breath. For my part I am quite unable to accept that. The very word "failure" denotes that the appellant had failed to do something which is possible, and if no equipment is provided, or defective equipment is provided, I cannot read the inability to provide a specimen of breath for that reason as a failure to do so within the meaning of s. 2 (5).

In those circumstances I find it quite unnecessary to consider the further question whether, assuming that the equipment was in perfect order, the power of

arrest only arises if the prosecution can satisfy the court that the appellant had no reasonable excuse for not providing it. It is unnecessary to consider whether really the words "without reasonable excuse" which appear in s. 2 (3) ought to be implied in s. 2 (5). As I have said, it is sufficient in my view to say that inability by reason of the absence of equipment, or defective equipment, does not amount to a failure within s. 2 (5). It follows that on this new ground, based really on the principle enunciated in *Scott v. Baker* (1), the conviction must be quashed. It is no fault on the part of the justices, since the point was never taken, and indeed perhaps did not spring to anybody's mind until after the decision in *Scott v. Baker* (1).

Having come to that decision, I for my part find it quite unnecessary to deal with the three points of a somewhat technical character which were argued before the justices. I prefer to say nothing about those points, and to base my decision merely on the new and wider point which has been taken in this court.

ASHWORTH, J.: I agree for the same reasons as those given by Lord PARKER, C.J.

WILLIS, J.: I agree.

Conviction quashed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *Woodcock & Sons*, Bury; *Bentley, Stokes & Louless*, for *Copper, Smith & Williams*, Burnley.

T.R.F.B.

(1) 132 J.P. 422; [1968] 2 All E.R. 993.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ. AND O'CONNOR, J.)

October 28, 1968

R. v. HIRCOCK. R. v. FARMER. R. v. LEGGETT

Criminal Law—Appeal—Fresh evidence—Events during trial—Conduct of trial judge—Signs of impatience and interruptions.

The power of the Court of Appeal to receive fresh evidence under s. 23 (1) (c) of the Criminal Appeal Act, 1968, on an appeal against conviction is not limited to the evidence of witnesses who speak to the offence or the offender, but it extends to evidence of what happened during the trial, as, e.g., the conduct of the presiding judge.

Where an allegation has been made that a trial has been rendered unfair by the conduct of the presiding judge, the Court of Appeal will draw a distinction on conduct which may be regarded as discourteous and showing signs of impatience—such as interruptions, grimaces and exclamations, which were alleged to have occurred in the present case—but which did not invite the jury to disbelieve the witnesses for the defence, and conduct which actively and positively has obstructed defending counsel in conducting his defence.

APPEALS by Alfred Richard Leggett, Anthony Stephen Farmer and Roy William Hircock against their convictions and sentences on Feb. 12, 1968, at Greater London (Middlesex Area) Sessions, of assault occasioning actual bodily harm and also, in the case of the appellant Hircock, of larceny. The appellants also sought leave to call fresh evidence.

P. M. Herbert for the appellants.

Viscount Stormont for the Crown.

WIDGERY, L.J., delivered the following judgment of the court: The court will now deal with the three appeals against conviction by the three appellants. They together with one Crowe (with whom the court is not concerned) were convicted at the Greater London (Middlesex Area) Sessions in February, 1968, the appellant Hircock on a count of larceny and a count of occasioning actual bodily harm, and the other two appellants in respect of the assault count only. They were each sentenced to terms of imprisonment which totalled thirty months.

The facts of the case need not be considered in detail in view of the course which this appeal has taken. Briefly, what was said by the prosecution was this, that at about 3 a.m. on Aug. 13, 1967, an Indian called Masters, who was a petrol-pump attendant at a garage, was on duty in that capacity when the three appellants arrived with Crowe in a car and asked for eighty cigarettes. Mr. Masters said that he produced the cigarettes, but that the appellants, and in particular the appellant Hircock, declined to pay for them; and he alleged that the appellant Hircock grabbed his hand and held it, and made some derogatory remarks about Mr. Masters' race. There was on the premises at that time a man called Durcan, and the learned chairman described Mr. Masters as "the small Indian" and Mr. Durcan as "the big Irishman", which may give some indication of the atmosphere of the matter. Mr. Masters called Mr. Durcan, and as there was continued refusal to pay for the cigarettes, Mr. Masters went to the kiosk to telephone for the police. To put the matter shortly, the case for the prosecution was that thereafter the four men concerned got out of the car and, perhaps with the intention of stopping Mr. Masters from telephoning for the police, set about them both, and particularly about Mr. Durcan, who was at the end of the incident left lying on the ground.

The matter was put before the jury by the learned chairman on the basis of common enterprise, because there was naturally a good deal of controversy in the evidence as to the precise actions of the four men at a given moment. They were represented by three counsel, and there was a considerable detailed investigation of the circumstances of the offence, and a great deal of attention paid by each counsel to proving that his particular client was not implicated in the fight which had undoubtedly developed.

The learned chairman left the case to the jury on the footing of common enterprise, and he was entitled so to leave it, because Mr. Durcan had undoubtedly given evidence to the general effect that he was set on by all four men. Although we have not got a full transcript, we have got a reference to Mr. Durcan's perhaps most material answer, which is quoted in the course of the summing-up. Counsel then appearing for the appellant Leggett, had intervened in the summing-up, and invited the chairman's attention to this passage. It read thus, in examination of Mr. Durcan:

"Q.—Who really attacked you? A.—That I could not tell. I know Crowe was behind me and the other three were around me. Who actually hit me I could not tell you. The next thing I remember was waking up in an ambulance. Q.—You say they really went for you? A.—Yes."

The learned chairman paraphrased those answers as being evidence from Mr. Durcan that all four men had gone for him at that stage.

The jury convicted all four, and it is right to say at the outset that, looked at individually, the evidence against the appellant Leggett was considerably less forceful than that against some of the others. The appellant Hircock, in particular, had made a comment to the police which was not consistent with innocence, but the appellant Leggett had maintained all the way through that he had been sitting in the back of the car with a girl friend engaged in matters other than

stealing cigarettes or fighting with the petrol-pump attendant; and it is right to say from the outset that the appellant Leggett's case did require rather special care and consideration on that account.

Before this court any criticisms which have previously been raised about the summing-up or the directions to the jury have not been pursued. Counsel for the appellants—who has said everything on their behalf with a great economy of words—has frankly said that such complaints as were originally directed to the direction to the jury are complaints which he does not think it proper to pursue; and the appeal before us has turned entirely on another ground altogether: the complaint being that the appellants (and particularly the appellant Leggett) did not get a fair trial owing to the conduct of the chairman.

It was said that the chairman had unfairly interrupted in the course of the evidence. The submission in the first instance was one which has appeared in these courts before alleging that the chairman had asserted himself too much in the course of the evidence and thus prevented the witnesses from giving a connected story or their counsel from examining them properly. It is right to say at once that an examination of the transcript does not bear that complaint out. It is perfectly true that we have not got a full transcript of all the evidence, but it was for the appellants, who have legal aid, to supply the court with such sections of the transcript as they relied on, and those sections which have been provided have been carefully scrutinised. There is no ground whatever for suggesting that the volume of interruption by the chairman in this case was excessive. On the contrary, he interrupted once or twice only in the evidence of each of the witnesses whose evidence has been put before us.

The real sting of the complaint relates to a matter not in the transcript at all. It can be summarised by saying that the learned chairman indicated a high degree of impatience during the trial; and, in particular, that when counsel was seeking to address the jury on behalf of the appellant Leggett he showed impatience in such a degree as to distract the jury from the submissions which were being made, and, in brief, to create an atmosphere in which a fair trial could not be obtained. Accordingly, counsel for the appellants as the basis of his submissions to us has sought leave to call evidence from a number of gentlemen who were present at the trial to testify to the matters to which I have referred.

The industry of counsel satisfies us that this is an approach which is novel so far as the reports go. There have been cases, as I say, where a trial has been held to be vitiated and the judge's conduct criticised by reference to the transcript; that is to say by reference to what the judge said in the course of the trial as recorded by the shorthand writer. But there is no case, as far as we know, where the conduct of the judge was sought to be attacked by evidence given from those present at the trial in respect of matters which the transcript does not disclose.

The first question for us to consider, as this point is novel, is whether evidence of this kind can ever be admitted. I refer to s. 23 of the Criminal Appeal Act 1968, which is the present authority regulating the calling of evidence in this court. It is to be observed that under s. 23 (1) it is provided:

"... the Court of Appeal may, if they think it necessary or expedient in the interests of justice—... (e) ... receive the evidence, if tendered, of any witness."

Accordingly, there is nothing in the statute to restrict the evidence which we can receive to witnesses who speak to the offence or the offender; and there is on the face of it no technical bar to our receiving evidence of what happened in the course of the trial.

The section goes on to provide by sub-s. (2) that the court shall receive evidence tendered in certain circumstances; but one ground on which the court can refuse to receive tendered evidence is, if it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal.

The first question to which we have had to apply ourselves is whether the evidence which counsel for the appellants seeks to tender is evidence which ought to be excluded on that last-mentioned ground. We have looked—indeed, the court must look in these circumstances—at the proofs from the witnesses whom the appellants seek to call. They are three in number: one from Mr. Alfred James Leggett (the father of the appellant Leggett), one from a Mr. May (who was present at the trial in the public gallery) and one from a Mr. Blake (the solicitor's clerk employed by the solicitors representing the appellant Leggett at the time).

So far as Mr. May and Mr. Blake are concerned, in their statements they both complain of persistent interruptions during the trial. Mr. Blake speaks of—

“persistent interruptions by the learned chairman, especially when defence counsel were cross-examining the prosecution witnesses, Mr. Durcan and Mr. Masters.”

Mr. May says:

“Throughout the trial there were many interruptions and sarcastic remarks by the chairman when the defence counsel were questioning the prosecution witnesses, and particularly when questions were being asked about the positions of the four defendants during the struggle on the forecourt of the filling station.”

As I have already said, the examination of the transcript, so far as the appellants have put it before us, shows that those allegations are entirely untrue. There were not persistent interruptions by the chairman at that stage at all.

Then all three of the proposed witnesses deal with another incident, which factually is accepted by counsel for the Crown, who was present at the trial and who has been able to help us in this regard. It seems that counsel then appearing for the appellant Leggett when he was about to address the jury after addresses by all other counsel, had indicated that in order to do justice to his case he was going to run through each defendant's case in turn to establish the position of the appellant Leggett during the fight. It is evident that the prospect of this somewhat protracted re-examination of the circumstances was something which did not appeal to the chairman, because all the witnesses say that he observed in a loud voice “Oh God”, and then laid his head across his arm and made groaning noises. There was a silence for a moment, and then the chairman looked up and said to counsel “Yes, yes” in what is described as a “testy way”, and counsel regarded that as the signal to proceed with this address to the jury, which in fact he then undertook. It is said that throughout the speech the chairman kept sighing and groaning, and one witness at any rate said that he observed “Oh, God” on more than one occasion.

The submission is that that evidence, if received, would form the basis of a further submission that this court should quash the conviction on the footing that the convictions were either unsafe or unsatisfactory. We are referred to *R. v. Clewer* (1). I find it unnecessary to read the judgment of LORD GODDARD, C.J., in full; but it is evident in that case that complaint was being made by defence counsel that he had been frequently interrupted by the judge and never had an opportunity of putting his defence fairly before the jury. Later on it

(1) (1953), 37 Cr. App. Rep. 37.

appears that the learned judge on that occasion had disparaged the defence which was being put forward and referred to counsel as putting up a "dust storm", and had indicated that he regarded the defence as devoid of foundation. Another reference in the judgment of LORD GODDARD, C.J., showed that the learned judge on that occasion had been disparaging the defence which counsel was gallantly endeavouring to lay before the jury.

It is to be observed that all those matters in *R. v. Clewer* (1) arose on the transcript. It was possible for the court to consider exactly what had happened because the matters of complaint were there in black and white. It is, we think, understandable that in all previous cases of this kind reliance has been placed on the transcript, because it is on the transcript that one will find interruptions and observations of the judge of the kinds referred to in *R. v. Clewer* (1), namely, those which prevent counsel from developing his case, and those which actively disparage the defence which is sought to be put up.

There is, in our judgment, a very important distinction between conduct on the part of the presiding judge which may be regarded as discourteous and may show signs of impatience—and, indeed, conduct which cannot be commended in any way—but which does not in itself invite the jury to disbelieve the defence witnesses, and conduct which positively and actively obstructs counsel in the doing of his work. The distinction is between that type of case first mentioned and the type of case in *R. v. Clewer* (1), where there was an invitation by the judge to the jury to disregard what was being said and active, positive interference with counsel in the pursuit of his task.

We have considered the present case in the light of such guidance as we get from *R. v. Clewer* (1), and we are impressed by the fact that it is quite clear that these three witnesses are wrong in the first allegation which they make. It is quite clear that they are wrong in saying that there were frequent interruptions during the evidence, because that is not borne out by the transcript. It is equally clear that the learned chairman gave indications of impatience when counsel then appearing for the appellant Leggett announced his intention of going through all three cases again; and whilst the court would not for a moment wish to condone any impatience of a discourteous kind, if such there was in this case, the fact remains that there is nothing here to suggest at all that counsel was interrupted in his address in the sense that he was unable to develop to the jury what he wished to say; and certainly there is no suggestion that the learned chairman was disparaging the appellant, as opposed to the appellant's counsel. If criticism by the learned chairman is a criticism of counsel in his handling of the case rather than of the case itself, it is obvious that the effect of that criticism on the trial and its outcome is very different from that which comes from a disparagement of the appellant himself.

We have given this case careful consideration because it is an important matter, but we are quite satisfied that the kind of conduct spoken to in the evidence of the proposed witnesses—although conduct which, if properly described, we could not possibly condone—is nevertheless not conduct of the kind which would cause the conviction to be unsafe or unsatisfactory; and, therefore, not conduct which could possibly affect the outcome of the appeal. Accordingly, we refuse leave to call these witnesses, and in the result we must dismiss the appeal against conviction.

The court has now turned its attention to the consideration of sentence, repeating, as was said before, that each of the appellants received a sentence of thirty months' imprisonment. Crowe, who of course does not appeal, was not

sent to prison, he was fined £100, and no doubt one of the factors which led to that result was that the jury had included in their verdict a recommendation for mercy for Crowe.

Counsel for the appellants has recently set out their records in full, and I find it unnecessary to repeat all the detail. It suffices to say that, although the appellant Hircock had not had any offence of violence before, he had been guilty of disorderly conduct, and that the appellant Farmer has a conviction on his record for assault on the police and another for threatening behaviour, whereas the appellant Leggett had convictions for assault on the police, assault occasioning actual bodily harm and threatening behaviour. But it is noteworthy that in every case these offences had been met by a fine, and up to now none of these men had been to prison, except the appellant Hircock for an offence of dishonesty, which for this purpose I need not take into account.

These offences of attacking attendants at petrol stations in the middle of the night are cowardly offences, and extremely prevalent at the present time, and they do therefore attract severe sentences. We have, however, been impressed by the fact that this was not a premeditated offence—the jury's verdict indicated that only the appellant Hircock had in mind that there should be any sort of stealing in this case—and we are also impressed by the fact that there were no weapons used.

Although it is difficult to say the sentences were wrong as passed, we feel there is sufficient doubt about them to make it desirable to reduce them in some measure. Accordingly, all the sentences of thirty months on count 2 will be set aside, and sentences of eighteen months' imprisonment will be substituted.

Appeals against conviction dismissed. Sentence reduced.

Solicitors: *Somer & Laity; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 28, 1968

R. v. COE

Magistrates—Indictable offence triable summarily—Serious offence—Prosecution not to invite summary trial—Powers of punishment insufficient—Duty of magistrates—Magistrates Courts' Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 19 (2).

The prosecution does not act in the best interests of justice by inviting magistrates to deal summarily with serious indictable offences even though such a course may be convenient, and expeditious summary trial should be invited only if the magistrates' powers of punishment appear sufficient. In the case of indictable offences the duty of magistrates is to begin to enquire into the matter as examining justices and to deal with a case summarily only if it can be brought within s. 19 (2) of the Magistrates' Courts Act, 1952.

Magistrates—Committal for sentence—Bail—Rarely to be granted—Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 29, as amended by Criminal Justice Act 1967 (c. 80) s. 103, Sch. 6.

On a committal for sentence under s. 29 of the Magistrates' Court Act, 1952 (as amended) the power to admit the offender to bail should be rarely exercised. The limitations imposed by s. 18 of the Criminal Justice Act, 1967, on the power to remand in custody do not apply to committal for sentence.

Observations on disparity of sentence on co-defendants.

APPLICATION by Anthony William Coe for leave to appeal against a total sentence of 30 months' imprisonment imposed on him by the deputy chairman at Hertfordshire Quarter Sessions to which court he had been committed for sentence under s. 29 of the Magistrates' Courts Act, 1952, and s. 56 of the Criminal Justice Act, 1967, by Hemel Hempstead Magistrates' Court, in respect of a series of offences committed mainly with one Molyneux (who was dealt with summarily).

M. E. Lewer for the applicant.

J. G. Connor for the crown.

LORD PARKER, C.J., delivered the judgment of the court: On 3rd July 1968 at Hemel Hempstead Magistrates' Court the applicant, together with his co-accused, one Molyneux, pleaded guilty to a whole series of offences committed between April and about the middle of June; indeed they went on right up to the moment when they were arrested on 15th June. They asked for a number of other offences, in the case of the applicant Coe 18 other offences, and in the case of Molyneux 17 other offences, to be taken into consideration. Without going into the details of all the offences, the general picture disclosed was as follows: six offences of shopbreaking and larceny committed jointly by the applicant and Molyneux involving property valued at more than £3,500; on each occasion a shop window was smashed, in two cases by reversing a car through the window; in addition one further offence of shopbreaking and larceny committed by Molyneux alone. Then there were some 11 offences of taking and driving away committed jointly and one similar offence by each of them, in other words 13 cars in all were taken and driven away. In each case of shopbreaking one such car was used, and the remainder were used for "joy-rides". Then there were two offences committed by the applicant while in Molyneux's company of driving while disqualified, two larcenies by the applicant from gas and electricity meters, offences which were in fact charged and admitted as storebreakings and larceny, and, finally, in addition, each of them admitted a number of larcenies, and in the case of the applicant a number of offences including a breach of probation for an original offence, again by taking and driving away. That was the general picture disclosed.

At the end of the case at the magistrates' court, Molyneux was dealt with by having imposed a sentence of six months' imprisonment suspended plus six months' suspended consecutive, in other words 12 months' suspended; the applicant Coe on the other hand was committed for sentence under s. 29 of the Magistrates' Courts Act 1952 and s. 56 of the Criminal Justice Act 1967. He was then let out on bail, and eight days later committed three further offences for which he was brought before the same magistrates' court and again committed for sentence to Hertfordshire Quarter Sessions. On 7th August before Hertfordshire Quarter Sessions, the applicant was sentenced to a total of 30 months' imprisonment and it is against that sentence that he seeks leave to appeal.

Before considering the propriety of that sentence of 30 months, this court would like to make a few observations on the course that these proceedings took:

(i) This court is quite unable to understand how it came about that the prosecution invited the justices, as they did, to deal summarily with the indictable offences. The picture of events known to them which I have shortly related, disclosed a really shocking state of affairs. Two young men of 22 were making wholesale raids on property throughout Hertfordshire and Bedfordshire, using cars taken and driven away for the purpose, and driving while disqualified. No doubt it is convenient in the interests of expedition, and possibly in order to obtain a plea of guilty, for the prosecution to invite the justices to deal with indictable offences

summarily, but there is something more involved than convenience and expedition. Above all there is the proper administration of criminal justice to be considered, questions such as the protection of society and the stamping out of this sort of criminal enterprise, if it is possible. This court would like to say with all the emphasis at its command that the prosecution in a serious case such as this are not acting in the best interests of society by inviting summary trial. This is by no means the first case in which the court has had to make these comments. They were made by LORD GODDARD, C.J., on a number of occasions in the past. They have been made by this court comparatively recently where really serious charges, maybe cases of violence, maybe, as here, raids on property, are put before the justices as suitable for them to deal with summarily. It is all the more important, now that the jurisdiction of the justices has been enlarged, for the prosecution to take care that they invite summary trial only in cases where the power in the justices to administer punishment is sufficient. This was on any view a very serious case in which both the applicant and Molyneux fully merited a sentence of four years' imprisonment, possibly more.

(ii) The court would like to observe that while in their view the prosecution were at fault, and while no doubt the invitation to the justices was a temptation to them to deal with it summarily, that is no excuse for the justices. Their duty in the case of indictable offences is to begin to enquire into the matter as examining justices, and only to deal with the case summarily if the matter can be brought fairly and squarely within s. 19 (2) of the Magistrates' Courts Act 1952. It is as well that we should remember what that subsection provides:

"If at any time during the inquiry into the offence it appears to the court, having regard to any representations made in the presence of the accused by the prosecutor or made by the accused, and to the nature of the case, that the punishment that the court has power to inflict under this section would be adequate and that the circumstances do not make the offence one of serious character and do not for other reasons require trial on indictment, the court may proceed with a view to summary trial."

As I have said, this court finds it quite impossible to say that this was other than a case of a most serious character, and one for which the powers of punishment that rested with the justices were wholly inadequate.

(iii) The third observation relates to the fact that the applicant was committed for sentence on bail. There is power now to grant bail to an accused committed for sentence under s. 29 of the Magistrates' Courts Act 1952, but in the opinion of this court the cases must be rare when justices can properly commit for that purpose on bail because the whole purpose of the committal is to have the accused sent to prison, and have him sent to prison for a longer period than the justices could impose. It is quite clear that the limitations put on the power of justices to remand in custody, which are to be found in s. 18 of the Criminal Justice Act 1967, have no application whatever to a committal under s. 29 of the Magistrates' Courts Act 1952. This court can only understand the committal on bail in the present case on the basis that the justices have been so exhorted in the past to put prisoners on bail, that they are almost automatically granting bail. This applicant had no right to be committed on bail.

(iv) Lastly by way of observation the court would like to say that they are quite unable to understand how the justices failed to commit Molyneux as well as the applicant for sentence. It is true that the applicant had the worse record, but there was evidence that Molyneux was likely to have been the ringleader. True Molyneux's previous appearances in court had been as a juvenile and he was therefore a first offender under the First Offenders Act 1958, yet with this whole

list of offences, 17 in all, to be taken into consideration, it was idle to think of him as in fact a first offender. It is again to be observed that in Molyneux's case there was an extra substantive offence of shopbreaking committed by him alone and not in company with the applicant, and a larceny and receiving also on his own. Finally, the maximum sentence which was within the justices' powers to pass was six months' imprisonment plus six months, and as Molyneux did not come within any of the exceptions set out in s. 39 of the Criminal Justice Act 1967, any prison sentence they passed had to be suspended. It is difficult to use moderate language in saying that such a sentence, 12 months in all suspended, was wholly inadequate.

Returning now to the applicant's sentence, no one can possibly say 30 months was other than a lenient sentence. It might well, as I have already said, have been four years and possibly more, and when one reads the transcript of what the deputy chairman said in imposing the sentence, it is clear that he deliberately made the sentence lenient having regard to the sentence passed on Molyneux. Indeed it is this disparity between the sentence passed on Molyneux and on the applicant respectively that is the real and only ground of this appeal. The court on many occasions, and it has been referred to several cases, has reduced a sentence to bring it more in line with the sentence imposed on a co-accused; it is something that this court tries to do in the general run of cases on the basis that only thereby can a sense of grievance be averted. But there is no principle of law that the sentences must strictly compare, and as LORD GODDARD, C.J., said in giving the judgment of the court in *R. v. Richards* (1):

"The fact that one of two prisoners jointly indicted has received too short a sentence is not a ground on which this court necessarily interferes with a longer sentence passed on the other . . ."

As I have said, the court does in general seek to ensure that sentences as far as possible favourably compare one with another, but they are not bound to do so and when one finds, as one does in the present case, that really the sentence imposed on the co-accused is a wholly inadequate sentence, this court can see no ground whatever for making the larger sentence strictly compare with the lower one; indeed on one view if one was doing that, the applicant would get no more than 12 months' suspended. As I have already said, the deputy chairman, realising this difficulty, was at pains to make the applicant's sentence less than it otherwise would have been because of what had happened to Molyneux. This court sees no ground for any further reduction than the deputy chairman himself allowed in arriving at the 30 months' imprisonment. Accordingly, this application is refused.

Application refused.

Solicitors: *Smee & Webb*, Hemel Hempstead; *Stanley Robinson & Commis*, St. Albans.

T.R.F.B.

(1) (1955), 39 Cr. App. Rep. 191.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 29, 1968

NORTHFIELD v. PINDER

Road Traffic—Being in charge of motor vehicle with blood-alcohol proportion above prescribed limit—Defence—No likelihood of driving—Period to be covered—Period extending as long as any probability of driving with blood-alcohol proportion above prescribed limit—Road Safety Act, 1967, s. 1 (3).

On a charge of being in charge of a motor vehicle with a blood-alcohol proportion exceeding the prescribed limit contrary to s. 1 (2) of the Road Safety Act, 1967, to establish a defence under s. 1 (3) the defendant must prove that there was no likelihood of his driving so long as there was any probability of his blood-alcohol proportion exceeding the prescribed limit.

CASE STATED by Peterborough justices

The appellant, Walter Harris Northfield, police inspector of Mid-Anglia Constabulary, Peterborough Division, preferred an information against the respondent, John Stuart Pinder, that, on Nov. 22, 1967, at Peterborough when in charge of but not driving a motor vehicle, namely, a Jaguar motor car, index number 5326 UR, on a road (or other public place) called Bull Hotel car park, he had consumed alcohol in such a quantity that at the time he provided a specimen of blood, the proportion thereof in his blood exceeded the prescribed limit, contrary to the Road Safety Act, 1967, s. 1 (2).

On the hearing of the information at Peterborough Magistrates' Court on Mar. 13, 1968, the following facts were proved or admitted. At about 6.0 p.m. on Nov. 22, 1967, the respondent went for a drink at the Bull Hotel, Westgate, Peterborough. He parked his red Jaguar motor car, 5326 UR, in the hotel car park which was a place to which members of the public had access and which was habitually used by them as well as by residents at and visitors to the hotel. The respondent locked the car and took away the keys which he retained in his possession until he was arrested by the police at 9.15 p.m. that evening. It was his intention when he left the car to return later and drive it away. The car had an immobilisation switch under the dashboard, which was not set. In the hotel the respondent intended to meet a friend who in fact did not arrive. The respondent remained in the hotel drinking beer and whisky and had nothing to eat. He had had nothing to eat since the previous evening. In the hotel he damaged a painting and was asked to leave. He realised that he had had too much to drink and left the hotel, but could not remember anything else clearly, though he recollected that he had objected strongly when being arrested. In Westgate, Peterborough, at 9.10 p.m., a Mr. McSparren was waiting for a bus at a bus stop which was on the opposite side of the road to the Bull Hotel but further along the road. He saw the respondent leave the hotel staggering about. He came up Westgate towards Mr. McSparren and went to a car parked on the road in Westgate opposite Mr. McSparren thirty or forty yards from the Bull Hotel and facing towards the town centre. The respondent took some keys from his pocket, went to the driver's door and fell on the ground. Mr. McSparren went across the road to the respondent and tried to pick him up. The respondent said, "Can you open my door?" Another man came along, and together they tried to get the respondent on his feet. The respondent was using bad language and asking for the car door to be opened. A police constable, P.c. Hunt, came up at about 9.15 p.m. and asked the respondent for the keys. The respondent refused to give the officer the keys and the police officer took

them. The respondent said that he wanted to get into his car and was going to drive home; the police officer told him he was not. As the police officer, P.c. Hunt, approached the scene, he saw that the respondent was half kneeling against the door of the car and was being assisted by Mr. McSparren. By the time the officer got up to the car, the respondent had fallen flat on his back and was bleeding from a cut on his nose. The officer thought that he was "pretty drunk" and proceeded to arrest him. The respondent struggled and punched the officer. He got to his feet but fell down again twice before a police vehicle arrived to take him to headquarters. He had to be carried bodily into the police vehicle. P.c. Hunt's evidence was corroborated by P.c. Bruce. On arrival at the police station at 9.30 p.m., the respondent was still violent, had to be restrained and fell down several times. At 9.35 p.m. he refused a breathalyser saying, "F— off or I'll kick your head in". He did in fact, however, take the breathalyser test, which proved positive, as did the second one taken at 9.50 p.m. At 10.35 p.m. Dr. Young, the police surgeon, arrived and took a blood sample, which was submitted to analysis, the result of which was a blood-alcohol content of 249 milligrammes of alcohol per hundred millilitres of blood. At the conclusion of the doctor's examination, the respondent was locked in the cells. In the cells he continued to be abusive and violent and punched a metal grill from the cell door. At 3.0 a.m., he was given a further breathalyser test which showed negative and he was released. The police officers first believed that the respondent's car was the Vauxhall car beside which he had been found. It was subsequently discovered, however, that the respondent's car was the red Jaguar, 5326 UR, which was found in the Bull Hotel car park by P.c. Bruce and Sgt. Edgar at 10.30 p.m. The place where the Jaguar was found was in the opposite direction to the place where the Vauxhall was parked some one hundred yards away from the Vauxhall car. Sgt. Edgar drove the Jaguar car to the police station using the keys which had been taken from the respondent.

It was contended by the appellant that the respondent was in charge of a motor vehicle, a red Jaguar, 5326 UR, that that vehicle was in a public place, the Bull Hotel car park, and that, at the material time, the respondent had a concentration of alcohol in his blood far in excess of the permitted level. If the foregoing matters were established, the burden of proof shifted to the respondent to establish a defence under s. 1 (3) of the Road Safety Act 1967. As to that the court had to be satisfied that there was no likelihood of the respondent's driving, not only at the moment of his arrest, but throughout the whole period when the alcohol in his blood exceeded the prescribed limit. On that matter there was positive evidence that it was the respondent's intention to drive, the fact that he approached the car at all, presumably believing it to be his, his attempt to open the driver's door and the evidence of Mr. McSparren that the respondent told the police he was going to drive. It was contended for the respondent that he was not technically in charge of his car because there was no evidence by the prosecution that he was anywhere near his own car when he was arrested and that, from the evidence, it was clear the police thought that the car that he was attempting to get into was his own car, whereas, when they returned after the arrest to collect the car they found that it had been taken away and the respondent's own car was some distance from that place. The respondent was so bemused by drink that he did not know what he was doing, and in this connexion cited a case from *WILKINSON'S ROAD TRAFFIC OFFENCES* (5th Edn.), p. 111, where a metropolitan magistrate acquitted a man who handled a car not his own solely because he (the defendant) was so bemused by drink that he did not know what he was doing (*THE SOLICITOR*, October, 1952), and

also a case where a magistrate acquitted a man who was so drunk that he was incapable of forming any intention with regard to the car in which he was a passenger (*JOURNAL OF CRIMINAL LAW* (1955), p. 111). In the Road Safety Act 1967 s. 1 (3), there was the statutory defence to the charge that a person should be deemed for the purpose of the Act not to have been in charge of a motor vehicle if he proved that at the material time the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained unfit to drive through drink or drugs, and he submitted that the respondent had proved that, in that the justices had heard how drunk he was and that he was incapable of getting to his vehicle. The prosecution had only attempted to prove the case by inference and there was no evidence before the court pointing either way as to the respondent's intention other than the respondent's own testimony, and the court must be left in doubt whether the prosecution's case had been proved, and therefore, were entitled to acquit assuming that the court accepted the respondent's evidence.

The justices dismissed the case, being of the opinion that the respondent had proved a defence to the charge as provided under s. 1 (3) of the Road Safety Act 1967, in that, at the material time, the circumstances were such that there was no likelihood of his driving his vehicle whilst he remained unfit. They came to that conclusion because from the evidence given by the respondent which was corroborated by Mr. McSparren and the two police constables, that at the material time, which they believed was from the time he was first seen to be under intoxication at 9.10 p.m. to 9.15 p.m. when he was arrested, he was so hopelessly drunk that he was incapable of driving a motor vehicle, was incapable of finding his vehicle and was incapable of walking to his vehicle which was some one hundred yards away in the opposite direction, in that after emerging from the hotel, and within walking a few yards he was on his knees, fell flat on the ground several times and was flat on his back when the police arrived, and even with the help of the witness McSparren and a passer-by, he was still not able to stand. The appellant appealed.

I. Judge for the appellant.

The respondent did not appear.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the petty sessional division of the Soke of Peterborough, who dismissed an information preferred by the appellant against the respondent that he, when in charge of but not driving a motor vehicle on a road or other public place had consumed alcohol in such a quantity that at the time he provided a specimen of blood, the proportion of alcohol in his blood exceeded the prescribed limit, contrary to s. 1 (2) of the Road Safety Act 1967. [His LORDSHIP stated the facts, and continued:] It is quite clear that he was in charge of his own car, the red Jaguar car; it is also clear that the alcohol content in his blood exceeded the prescribed limit, and the sole question was whether he had a defence under s. 1 (3) of the Road Safety Act 1967, which provides:

"A person shall not be convicted under this section of being in charge of a motor vehicle if he proves that at the material time the circumstances were such that there was no likelihood of his driving it so long as there was any probability of his having alcohol in his blood in a proportion exceeding the prescribed limit."

In regard to that, the justices found that he had satisfied them, the burden of proof being on him, that such was the position, and the reasons they give are as follows:

"From the evidence given by the respondent which was corroborated by Mr. McSparren [he was the bystander] and the two police constables, that, at the material time, which we believe was from the time he was first seen to be under intoxication at 9.10 p.m. to 9.15 p.m. when he was arrested, he was so hopelessly drunk that he was incapable of driving a motor vehicle, was incapable of finding his vehicle and was incapable of walking to his vehicle which was some one hundred yards away, in the opposite direction, in that after emerging from the hotel and within walking a few yards he was on his knees, fell flat on the ground several times and was flat on his back when the police arrived, and even with the help of the witness McSparren and a passer-by, he was still not able to stand."

It seems to me perfectly clear that, if one is judging the likelihood of his driving between 9.10 and 9.15 p.m., quite clearly there was no probability of his driving then because at that time, in that five minutes, he was hopelessly drunk, so incapable that he could not find his own car, get into it or do anything. But, in my judgment, that is not the end of the case, because he has to prove that, at the material time, the circumstances were such that there was no likelihood of his driving it, that is, in the future, so long as there was any probability of his having alcohol in his blood in a proportion exceeding the prescribed limit. Bearing in mind that he was found to have 249 milligrammes as against the prescribed limit of eighty milligrammes per one hundred millilitres of blood, he has to prove that at all times until his alcohol content dropped from 249 to eighty, there was no likelihood of his driving. The most normal way of proving that would be for him to prove that he had handed over the keys to somebody else, or that he had taken a room for the night realising that he was drunk, or something of that sort, but there was really no evidence here from which the justices could say that they were satisfied that, even if the worst effects of the alcohol wore off, he still would not drive it until it had come down to the prescribed limit. There was no evidence of that whatsoever, and, in those circumstances, it seems to me that this Case must go back to the justices with a direction that they should convict.

I would only add this, that counsel for the appellant before this court has urged that the material time extends over the whole period when the alcoholic content was greater than eighty milligrammes, in other words from a time while he was still in the public house until some time very much later. For my part, I find it quite unnecessary to lay down the limit of "the material time". One thing at any rate is clear, that is it must include the time when he was found at 9.10 p.m. to be in charge of the vehicle, and in a state where anyone would suspect that his alcohol content exceeded the prescribed limit.

I would allow this appeal and send it back to the justices with a direction to convict.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co., for C. Peter Clarke, Peterborough.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ. AND O'CONNOR, J.)

November 4, 1968

R. v. LEWIS

Criminal Law—Evidence—Alibi—Notice of particulars—Extent of statutory requirement—Application only when alibi relates to time of alleged crime—Place or date of offence—Reference to committal charge and depositions—Wrongful exclusion of alibi evidence—Application to proviso to s. 2 (1) of Criminal Appeal Act, 1968—Criminal Justice Act, 1967, s. 11.

The statutory requirement in s. 11 of the Criminal Justice Act, 1967, that particulars of an alibi defence must be given within seven days of the end of the proceedings before the examining justices, and that, unless these are given, evidence relating to alibi cannot be given by the defendant without leave of the court, applies only where the evidence relates to the whereabouts of the defendant at the time when the crime is alleged to have been committed. Accordingly, evidence relating to his whereabouts on some other occasion is not subject to the restrictions of the section.

Where a question arises with regard to the place or date at or on which the offence is alleged to have been committed for the purpose of s. 11 of the Act of 1967, the question must be resolved by reference to the committal charge and depositions.

PER CURIAM: Where alibi evidence has been wrongly excluded, the Court of Appeal will rarely apply the proviso to s. 2 (1) of the Criminal Appeal Act, 1968.

APPEAL by Albert Roy Lewis against his conviction at the Crown Court, Manchester, before the commissioner, His Honour JUDGE STEEL, of receiving stolen property.

H. A. Kershaw for the appellant.

C. B. K. Mantell for the Crown.

WIDGERY, L.J., delivered the judgment of the court: The appellant was convicted of receiving on July 17, 1968, at Manchester Crown Court and was sentenced to eighteen months' imprisonment. He now appeals against his conviction on a certificate of the trial judge in which certificate the following grounds are given:

"1. Whether the [appellant's] evidence as to his movements on the morning of 16th February, 1968, amounted to a defence of alibi within the meaning of Section 11 of the Criminal Justice Act 1967. 2. No notice having been given by the [appellant] in accordance with Section 11 (2) of the said Act, whether [the learned judge] was right in refusing leave for evidence in support of the alibi to be given at the trial."

The case started with a breaking into a post office at Didsbury at some time between Feb. 10 and 11, 1968. Following the breaking-in, a safe containing money, stamps and postal orders and a date stamp was stolen. The next event occurred on Wednesday, Feb. 14, when, according to Edwards, Goldstraw and Brett (who were, by the time of the committal proceedings, the self-confessed thieves who had broken into the post office at Didsbury), the appellant called at Edwards' house and as a result of negotiations which then took place it was agreed that the appellant should have a quantity of stolen stamps and postal orders from the Didsbury offence. The appellant took them away in his car on a promise to pay later. At the time when these negotiations took place in Edwards' house on Wednesday, Feb. 14, there was also some negotiation about a carpet. A Miss Smallbridge, who said that she had been present at the interview on the night of Feb. 14 at Edwards' house, confirmed the fact

that the postal orders were then taken out of the house into the appellant's car, but she said that they were taken out not in the hands of the appellant but in the hands of one John Lewis who also was present.

On Feb. 16 (which was the Friday) at 12.05 p.m. a man cashed two of the stolen postal orders at a post office in Sale. As he was leaving, the postmaster noticed that the numbers of these orders were on his "stolen property" list and he ran out of the shop in order to stop the man who had recently been in and cashed them. All he saw, however, was a Cortina motor car just leaving, containing another man as driver with the man who had cashed the postal orders sitting in the passenger seat. The postmaster recorded the number of the vehicle and reported it to the authorities, and since the vehicle was registered in the name of the appellant, the police very soon found him. At 12.45 p.m. on the same day, Feb. 16, the police found the appellant driving the Cortina motor car which, according to the postmaster, had been concerned in the cashing of the postal orders earlier that day. He was asked whether he had been in the post office and he said, "No". In due course at the trial he developed his defence by saying first that, as regards going to Edwards' house on the evening of Wednesday, Feb. 14, he had gone solely in regard to the carpet transaction; any transaction in regard to the postal orders was carried out by John Lewis, who accompanied him, without his authority or knowledge. Further, he explained his movements on Feb. 16 by saying he had lent his car to John Lewis briefly and had just recovered it at the time when the police found him driving it.

No notice was given in regard to alibi evidence in support of the appellant's movements at midday on Feb. 16 and when that evidence was tendered the learned judge—not, we are told, counsel for the prosecution—took the point that alibi evidence in regard to the appellant's movements at midday on Feb. 16 was not admissible without the leave of the court under the terms of s. 11 of the Criminal Justice Act 1967. It may be that this is the first time the court has had to consider this section, so I should read the appropriate part of it. Section 11 (1) provides:

"On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi."

Then in s. 11 (8) two of those phrases are defined.

" 'Evidence in support of an alibi' means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. 'Prescribed period' means the period of seven days from the end of the proceedings before the examining justices."

There was considerable argument before the learned commissioner as to the application of that section to alibi evidence sought to be called by the appellant in respect of what happened on Friday, Feb. 16, and in the course of that argument reference was made to the fact that under s. 4 (7) of the Criminal Law Act 1967, the actions of the appellant on the Friday might in themselves now support a charge of receiving. The subsection to which I have referred reads as follows:

"For the purposes of s. 33 of the Larceny Act, 1916 and of any other enactment relating to receivers or receiving a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention,



removal, disposal or realisation by or for the benefit of another person or if he arranges so to do."

The argument, which clearly appealed to the learned commissioner, was that the conduct of the appellant as spoken to on Feb. 16, if he was in truth the driver of the car, would be sufficient to justify a conviction for receiving under s. 4 (7), regardless of any of the evidence of his movements on the night of Feb. 14 when he went to Edwards' house. It seems clear that it was on that footing that the learned commissioner thought that alibi evidence relative to the appellant's movements on the Friday could properly come within the definition of evidence in support of an alibi under s. 11 (8) of the Criminal Justice Act 1967. The commissioner therefore ruled that notice of alibi was required by the section and declined to exercise his discretion to admit the evidence.

The matter comes before us on appeal on the certificate to which I have already referred. In this court, counsel for the Crown recognises that the decision of the learned commissioner was wrong, and I will deal in a moment with the reason why in the view of this court it was wrong. Counsel goes on however to urge that the court should consider applying the proviso to what is now s. 2 (1) of the Criminal Appeal Act 1968, and uphold the conviction notwithstanding any irregularity which occurred, but the court is quite unable to take that course, and feels that circumstances in which the proviso is applied to an irregularity which consists of the exclusion of alibi evidence must be rare indeed.

The reasons which prompt us to say that the learned commissioner was wrong can be put quite shortly. It will no doubt be proved in future that there are many difficulties in s. 11, but we are not proposing to deal with more than those which strictly arise today. We think that two propositions can be stated with confidence on the section, and they are these: first, that the only evidence in support of an alibi to which s. 11 applies is evidence relative to the whereabouts of the accused at the time when the crime is alleged to have been committed. Evidence relative to his whereabouts on another occasion is not subject to the restrictions of the section, however significant that evidence may be to the issues in the case. Thus, if the accused is charged with a robbery which is alleged to have been committed on a Monday, and part of the evidence against him is that he was seen on the Tuesday driving a van which contained the stolen goods, he may tender evidence of alibi relating to the Tuesday without giving notice under the section.

Secondly, the accused is required to give notice of alibi under the section within seven days of the end of the proceedings before the examining justices, and if a question arises as to the place or date at or on which the offence is alleged to have been committed for the purpose of s. 11 (8), this question must be resolved on the material then available to the accused, namely, the committal charges and the depositions. At the trial the prosecution may seek to put the case in a different way or on different charges, but this cannot create any new duty on the accused to give notice of an alibi.

In the present appeal, it is clear that the case for the prosecution on committal was that the appellant had received the goods from Edwards on the Wednesday by taking possession of them on that day. On this basis, evidence of the appellant's activities on Friday would not support a separate charge of receiving under s. 4 (7) of the Criminal Law Act 1967, and would not relate to his whereabouts at the time when the offence was alleged to have been committed.

Whether at the trial the prosecution could put the case in the alternative would depend on the form of the indictment, and other considerations with which we are not concerned, but nothing which happened after committal could affect the appellant's obligation under s. 11.

The committal charge referred to receiving these goods between Feb. 11 and 16. The depositions contained the evidence, inter alia, of Edwards, detailing the physical taking of possession by the appellant on the evening of Wednesday, Feb. 14. The case for the prosecution at that time was unquestionably that the appellant had received and taken control of the goods from Edwards on the Wednesday. Evidence relating to his movements on the Wednesday would have been subject to the restrictions in s. 11. Evidence of his movements on the Friday was not subject to the restrictions in that section at all. Accordingly, the learned commissioner in our judgment reached a wrong conclusion on this issue and the conviction must be quashed.

Appeal allowed.

Solicitors: *Registrar of Criminal Appeals; D. S. Gandy, Manchester.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

November 6, 1968

GARMAN v. PLAICE

Magistrates—Information—No offence disclosed—Information void ab initio—No power to cure by amendment—Poaching Prevention Act, 1862 (25 & 26 Vict., c. 114), s. 2—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 100 (1).

By s. 2 of the Poaching Prevention Act, 1862: "It shall be lawful for any constable . . . in any highway . . . to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game . . . and having in his possession any game unlawfully obtained, or any gun . . . used for the killing or taking game, and also to stop and search any . . . conveyance in or upon which such constable . . . shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person . . . or . . . conveyance, to seize and detain such game, article, or thing; and such constable . . . shall in such case apply to some justice of the peace for a summons citing such person to appear before [justices] as provided in [s. 9 of the Criminal Justice Act, 1855] . . . and if such person . . . shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay [a penalty] and shall forfeit such game, guns . . ."

By s. 100 (1) of the Magistrates' Courts Act, 1952: "No objection shall be allowed to any information . . . for any defect in it in substance or in form, or for any variance between it and the evidence adduced on behalf of the prosecutor or complainant . . . at the hearing of the information . . ."

The appellant preferred an information against the respondent alleging that, in pursuance of s. 2 of the Poaching Prevention Act, 1862, as a police officer he lawfully searched on the highway the respondent whom he had good cause to suspect of coming from certain land where he had been unlawfully in search or pursuit of game and having in his possession game unlawfully obtained or a gun or cartridges, and that on the search there were found on the respondent pheasant feathers, and a gun and cartridges which the appellant then and there seized and detained in pursuance of s. 2. At the hearing the information was amended so as to allege that the appellant lawfully stopped and searched a van in or upon which he had good cause to suspect that game "or articles or things as aforesaid" were being carried, and that there were found in the van the articles mentioned in

the information as originally framed. The information did not mention either of the substantive offences in s. 2, namely, obtaining game "by unlawfully going on any land in search or pursuit of it", or using "such article or thing . . . for unlawfully killing or taking game", or the accessory offence referred to in the section.

HELD: the information was void ab initio, as it did not disclose any offence, and, being void ab initio, could not be cured by s. 100 (1) of the Magistrates' Courts Act, 1952.

CASE STATED by justices for the county of Norfolk acting for the petty sessional division of Clackclose.

The appellant, P.c. Sidney Desmond Garman, preferred an information against the respondent, Malcolm Plaice, in the terms set out, post. In the course of the hearing at Downham Market Magistrates' Court on Mar. 20, 1968, application was made by the appellant for leave to amend the information, and the justices, in view of the terms of s. 100 of the Magistrates' Courts Act, 1952, gave leave for the amendment to be made by adding the words set out, post. Subsequently a submission was made on behalf of the respondent that the information was bad in that it did not allege an offence. The respondent submitted that the information should have been continued with further wording positively alleging that the respondent had used the gun for unlawfully killing or taking game. The justices ruled that the information was bad in law and dismissed the charge. The prosecutor now appealed.

J. G. Marriage for the appellant.

B. S. Green for the respondent.

ASHWORTH, J.: In this appeal, which comes by way of Case Stated from a decision of justices for the county of Norfolk sitting at Downham Market, the appellant brought an information against the respondent under the Poaching Prevention Act, 1862. The whole issue before this court is whether the information in question was sufficient to give the justices jurisdiction to convict the respondent. Section 2 is a long section couched in terms which were familiar in 1862 containing matters introductory, matters consequential, and then finally what I will call matters of substance, namely the actual charge. I accept willingly counsel for the appellant's break-down of the section. He said there were three parts, the earlier part gives jurisdiction, then the second part is consequential, because on the earlier part being established the obligation to issue a summons is mandatory; and then thirdly he said the justices decided whether the offence had been proved—and, one asks, what offence? because the matters introductory contained at least two offences, and indeed the matter of substance contains at least two offences, probably three, because it refers to an accessory.

With that start let me just quote the information on which these proceedings were based. The information was preferred by the appellant against the respondent:

" . . . that he on the 26th day of November 1967 in a certain highway called the Shouldham-Watlington Road in pursuance of section 2 of the Poaching Prevention Act 1862 lawfully did search Malcolm Plaice whom he had good cause to suspect of coming from certain land where he had been unlawfully in search or pursuit of game and having in his possession game unlawfully obtained or a gun or cartridges and on the said search there was found upon the respondent pheasant feathers, a gun and cartridges which the appellant did then seize and detain in pursuance of the said section "

full stop, and full stop in more senses than one. It was that information on which the proceedings were based.

When it came on for hearing those appearing for the prosecution were conscious that perhaps they had not included all the matters introductory, and this information might be improved by amendment, so they added these words:

"and also lawfully did stop and search a certain van in or upon which he had good cause to suspect that certain game or articles or things as aforesaid were being carried [and on the said search there was found on the] said van [pheasant feathers]"

etc. The application to make that amendment was granted, but it did not occur to those appearing for the prosecution that a still further amendment might be more rewarding if they included in the information the matter of substance in the third limb of the section, and accordingly those appearing for the respondent submitted that this information, albeit amended, disclosed no offence. If one reads the section, which I do not find it necessary to do, it is quite plain that neither of the two substantive offences in the third part of the section nor the accessory offence is referred to in terms. As counsel for the respondent points out, neither of the two substantive offences can really be fitted in precisely to the matters introductory which formed the basis of the information. It is true, as counsel for the appellant says, that there are reported cases in which this particular objection was not taken, and indeed the court appears to have proceeded on the footing that a summons in much the same form, or an information in much the same form as that used in the present case was free from objection. But there is one important recorded case, namely that of *Lundy v. Botham* (1), when this particular point was precisely taken and decided in this court. It is only necessary, I think, to read the judgments. They are both very short. MELLOR, J., said:

"The justices seem to have proceeded on the earlier part of the section, but the offence is set out in the latter part of it. I think the point taken by the appellant's solicitor was a good one in the circumstances. No amendment of the summons was asked for or made, and I think the information did not charge any offence known to the law."

FIELD, J., said:

"I am of the same opinion. I rest my opinion on the ground that the information does not charge any offence . . ."

That case, so far as this court is aware, has not been considered or criticised in any way; it decides this precise point. For my part I am content to follow it. My own view independently of that decision would be precisely to the same effect. It is sought by counsel for the appellant to rescue the appeal by reliance on s. 100 of the Magistrates' Courts Act, 1952, but that rescue operation can have no success at all if, as I believe to be the fact, the summons or information is void ab initio, by not disclosing any offence at all. For these reasons I think the justices reached the right conclusion and I would dismiss this appeal.

WILLIS, J.: I agree.

LORD PARKER, C.J.: I also agree.

Appeal dismissed.

Solicitors: *Jaques & Co.*, for *Hawkins, Ferrier & Newnes*, King's Lynn;
Henry Pumphrey & Son, for *Metcalfe, Copeman & Pettefar*, King's Lynn.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, J.J.)

November 5, 6, 1968

McWHIRTER AND ANOTHER v. PLATTEN

Election—Local government—London borough—Discrepancy between figures announced and votes cast—Offence in relation to ballot papers—Application for order and inspection—Desire to institute prosecution—London Borough Council Elections Rules, 1968 (S.I. 1968 No. 427), r. 49 (1) (b).

When the voting results in three wards in a London borough were published, in two of the three wards the published results showed excesses of 32 per cent. and 8½ per cent. respectively over the votes cast, and in the third ward a deficiency of 20 per cent. The appellants, who were a ratepayer and an unsuccessful candidate in one of the wards, applied to the county court judge for an order under r. 49 (1) (b) of the London Borough Council Election Rules, 1968, that an inspection of the counted ballot papers should be made if the judge was satisfied that the order was required for the purpose of instituting or maintaining a prosecution of an offence in relation to ballot papers. The judge refused to make the order on the ground that the offence in respect of which the prosecution was sought under s. 51 of the Representation of the People Act, 1949, was not an offence "in relation to ballot papers and, alternatively, that the order asked for was not "required" for the purpose of instituting or maintaining a prosecution having regard to the evidence available. He added that, had he held otherwise, he would, in the exercise of his discretion have refused the order on the ground, inter alia, of preserving confidence in the secrecy of the ballot. On appeal.

HELD: the appeal must be allowed, since (i) the figures showed that someone might have been guilty of a grave dereliction of duty in relation to the counting of votes on ballot papers, which would be an offence "in relation to ballot papers"; (ii) the order was required to enable the votes to be recounted, because until the recount took place it was impossible to particularise the dereliction of duty or the act or omission within s. 51 which constituted the offence, or who should be prosecuted; (iii) the desire of secrecy was irrelevant, because there could not be any secrecy in the totality of the votes as opposed to how any particular person voted.

APPEAL by Alan Ross McWhirter, a ratepayer in the London Borough of Enfield, and Ruth Bradbury, an unsuccessful independent candidate in an election for one of the wards of that borough, against the refusal of His Honour JUDGE GRANT at Edmonton County Court to order the opening of sealed packets of counterfoils and the inspection of counted ballot papers in respect of local elections held May 9, 1968, in the West Ward, Highfield Ward and Craig Park Ward, of the London Borough of Enfield, pursuant to r. 49 (1) (b) of the London Borough Council Elections Rules, 1968.

The judge held that the evidence before the court did not disclose the commission of an offence "in relation to ballot papers" within the meaning of the Representation of the People Act 1949, and, alternatively, that the order asked for was not "required" having regard to the evidence available at the time of the hearing of the application. In any event, he said, in the exercise of his discretion, he would have refused to make the order as no suggestion of bad faith had been made and the admitted inaccuracy would not have affected the result of the election although it might have affected the position of the candidates, and in the circumstances it seemed more important to maintain public confidence in the secrecy of the election than to make the order to permit a possible prosecution of an offence not involving dishonesty.

The appellant McWhirter appeared in person on his own behalf and on behalf of Mrs. Bradbury.

P. Freeman and Michael Burrell for the respondent.

LORD PARKER, C.J.: On May 9, 1968, local elections took place, amongst other places, in the borough of Enfield. There are thirty wards, each returning two candidates, and in one of those wards, West Ward with which we are concerned in the present case, there is no doubt that the elected candidates were Conservatives. There were in addition two Labour candidates, two Liberal candidates and two Independent candidates, the two Independents being Mrs. Bradbury, who is one of the appellants, and her husband, Mr. Bradbury. The count in this ward took place in the presence of the election agents of the various candidates. The matter with which we are concerned came to light as the result of something that was said to Mr. Harris, who was the election agent of the two Independent candidates. The counting officer, or his deputy, told Mr. Harris at the end of the count that broadly speaking, subject to checking, the Conservative candidates had 2,600 votes each, the Labour candidates 170, and the two Liberal candidates 140 votes. So far as Mr. Harris's candidates, Mr. and Mrs. Bradbury, were concerned, he was told that subject to minor adjustments, Mr. Bradbury had got 525 and Mrs. Bradbury 519; in other words, they came second to the Conservatives and above the Labour and Liberals.

To Mr. Harris's amazement, when the formal announcement was made of the result, he found that the two Labour candidates had been given votes which exceeded those in respect of Mr. and Mrs. Bradbury, in other words the Labour candidates had come second. As a result, the returning officer, the respondent, looked into the matter, and he came across a very curious state of affairs—a shocking state of affairs really—as the result of which he felt constrained to make an announcement in the Press, and on May 24 the following announcement was made by the respondent:

“Following publication of the detailed results of the recent Borough Elections my attention has been drawn to apparent arithmetical discrepancies in the figures for [not merely West Ward, but Craig Park and Highfield Wards] I have discussed these matters with the agents of the candidates primarily concerned and such enquiries as I have been able to make, having regard to the provisions of electoral law designed to preserve the secrecy of the ballot, lead me to the following conclusions: (i) There has been no case in which there has been a failure to include in the count any votes cast, but the total number of votes appears to have been miscalculated, with the result that in two cases candidates as a whole appear to have been credited with more votes than were actually cast. (ii) In the third case candidates as a whole appear to have been credited with fewer votes than the total votes cast but in such proportions as not to affect their relative positions. (iii) In no case does it seem that these matters affect the result of any election. Having regard to the enquiries received, I have felt it desirable in the public interest that the Press should be informed of the position. If any further information becomes available it will be given to the press in full consultation with the agents concerned.”

On 7th June, a further notice was issued which said:

“... I have found nothing to justify any variation of the conclusions referred to in my previous statement. I have also examined the legal position and have discussed this with the Home Office, which is responsible for the statutory provisions governing election procedure. The Home Office officials have authorised me to say that, while the interpretation of the law is a matter for the courts, they are firmly of the opinion that it would be improper and contrary to the statutory provisions designed to safeguard

the secrecy of the ballot for me to re-check the sealed ballot papers. In their view, the results having been declared and published I have no further function to perform unless in pursuance of a court order."

The respondent very properly went into the matter, and what caused him to make this announcement to the press were the following discoveries: he found that in the case of Craig Park Ward the votes counted for the candidates amounted to 2,787, whereas, if the ballot papers issued had been fully filled up, because each ballot paper provided for two votes, there should have been 3,546 votes counted; that in other words is a 20 per cent. deficit of votes counted over the votes that would have been cast if the ballot papers issued had been properly filled up; that was Craig Park Ward. In respect of Highfield Ward, the vote count revealed 7,224 votes, whereas if every ballot paper had been properly filled up with two votes, there could only have been 5,454 votes cast. In other words, in this case there was no less than a 32 per cent. excess of votes counted over those that could possibly have been cast on the basis of the ballot papers issued. Finally, in respect of West Ward, again there was an excess of votes counted over those that could have been cast; in that case the excess was smaller, though by no means insignificant, $8\frac{1}{2}$ per cent.

Nobody expects counting in an election to be completely accurate; indeed I suppose if one goes on recounting one will get in each case slightly different results. But really, when one is dealing with matters such as 32 per cent., 20 per cent. and even $8\frac{1}{2}$ per cent., quite clearly something has gone very wrong. Though it has nothing to do with this case, I confess it alarms me that this sort of thing can happen on this scale, and still more am I alarmed when I am told, and I am very ready to accept it from such of the statutory instruments that I have looked at, that there is no means of letting the public know what are the correct figures. There is no means of ascertaining the correct figures unless a court order can be made for the production of the ballot papers, and their investigation and counting.

The only jurisdiction in turn that the court has to make any such order is to be found in r. 49 of the London Borough Council Elections Rules 1968. It is for an order under that rule that Mrs. Bradbury, one of the candidates, and Mr. McWhirter, who is a ratepayer in the borough and has spoken on his and on Mrs. Bradbury's behalf, now apply having been refused one by the county court judge. In effect, therefore, this is an appeal from the county court judge's refusal to make such an order. Rule 49 (1) is in these terms:

"An order—

(a) for the inspection or production of any rejected ballot papers, including ballot papers rejected in part; or

(b) for the opening of a sealed packet of counterfoils and certificates as to employment on duty on the day of the poll or for the inspection of counted ballot papers,

may be made by either a county court having jurisdiction in the London Borough or any part thereof or an election court, if the court is satisfied by evidence on oath that the order is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of an election petition."

Rule 49 (3) provides:

"An appeal shall lie to the High Court from any order of a county court made under this rule."

Let me say at once that there is no question whatever of an election petition.

The Conservatives were elected by a very large majority, and there is no question of Mrs. Bradbury or anybody else bringing an election petition. Therefore the sole ground advanced, and it is advanced by Mr. McWhirter and Mrs. Bradbury, is the first one, namely that the order is required for the purpose of instituting a prosecution for an offence in relation to ballot papers. Both Mr. McWhirter and Mrs. Bradbury have sworn that is the object, in their affidavits.

As it seems to me, the considerations involved are three-fold: first, is the intended prosecution one for an offence "in relation to ballot papers"; secondly, is an order "required" for the purpose of that institution; and lastly, since the words are "an order . . . may be made" as a matter of discretion, is this a case where an order should be made? Dealing with those matters seriatim, the county court judge came to the conclusion that here what Mr. McWhirter and Mrs. Bradbury intended was not a prosecution for an offence in relation to ballot papers. The offences in connection with elections are to be found set out in the Representation of the People Act 1949. There are numbers of offences, and it is sufficient for this purpose just to refer to the offences set out in the fasciculus of sections beginning with s. 47 and ending with s. 52. Section 47 deals with personation and provides that a person shall be guilty of personation at a local government election if he votes as some other person. Then in s. 48 there are offences set out in the case of a person who votes when he knows he is under a legal incapacity, and when he votes in more than one place. Section 52 creates offences in the case of a number of matters, such as tampering with nomination papers, defacing or destroying a ballot paper, supplying a ballot paper to another person, and putting into a ballot box a paper other than a ballot paper, fraudulently taking out of the polling station any ballot paper, and destroying or interfering with a ballot box or a packet of ballot papers. According to a helpful note prepared by counsel for the respondent, at the trial before the county court judge, the county court judge said this:

"In my judgment, while I sympathise with McWhirter's concern at miscounting, the matter must be approached unemotionally. The nature of the offence under Regulation 49 can be seen by looking at the types of offence in s. 52. This case is a world apart from ballot paper offences. An offence in relation to ballot papers directly concerns ballot papers and not indirectly."

I do not myself think that the county court judge was saying that the offences in relation to ballot papers referred to in r. 49 were limited to the offences set out in s. 52, and indeed counsel before this court has not suggested that. It is quite clear that there are a number of offences in s. 47, s. 48, s. 49 and s. 52 which are clearly offences in relation to ballot papers. The real question here is whether the offence created by s. 51, which I must read in a moment, can be said to be an offence in relation to ballot papers. I say that because it is a prosecution for an offence against that section which the appellants intend. Section 51 provides:

"(1) If any person to whom this section applies, or who is for the time being under a duty to discharge as deputy or otherwise any of the functions of such a person, is, without reasonable cause, guilty of any act or omission in breach of his official duty, he shall be liable on summary conviction to a fine not exceeding one hundred pounds . . . (3) The persons to whom this section applies are— . . . (b) any person whose duty it is to act as returning officer at or to take part in the conduct of a local government election or to be responsible after a local government election for the used ballot papers and other documents (including returns and declarations as to expenses) . . ."



What is said here is that the respondent was undoubtedly responsible for the conduct of the count; nobody expects a returning officer physically to do the counting of the votes himself; he is responsible for the system and for the appointment of his assistants or clerks who are going to do the work; and under the section each one of those assistants and clerks is himself taking part in the conduct of a local government election, and if he has been guilty of a gross failure to count, he might well be said, in the absence of reasonable cause, to be guilty of a dereliction of duty, and therefore guilty of an offence under that section.

As I have said, there are bound to be differences in counting, but we are here dealing with a deficit of 20 per cent. in one case and an excess of 32 per cent. in the other, and those figures in my judgment show that somebody may have been guilty of a grave dereliction of duty. It seems to me that a grave dereliction of duty in relation to the counting of votes on ballot papers, which is an offence, must be an offence in relation to ballot papers, and in my judgment the county court judge took too narrow a view of the matter.

The second question is whether this order is "required" for the purpose of instituting a prosecution for an offence against s. 51. It is said by counsel that it is quite unnecessary, the respondent has quite frankly said that he found these gross errors, 20 per cent. deficit, 32 per cent., and a $8\frac{1}{2}$ per cent. excess in other cases, and that is sufficient if Mr. McWhirter and Mrs. Bradbury desire to found a prosecution. For my part I am quite unable to accept that; it seems to me that this order is required to enable the votes to be in effect recounted, because until there is a recount it is quite impossible to particularise the dereliction of duty, the act or omission within s. 51 (1) which constitutes the offence. To take as an example the Craig Park Ward, the first thing that is necessary is to ascertain what votes were in fact cast; according to the count it was 2,787, but if that turns out to be the accurate figure, one asks oneself what has happened to all the other votes on the ballot papers that were issued that are not accounted for; they may have been abstracted, they may not have been filled up or fully filled up. On the other hand, if it is found that there are many more than 2,787 and more like the 3,546 that could have been cast, then there has been a grave miscount; but until the position is known, no one can say what dereliction of duty has occurred. Then again, as it seems to me, this order is necessary in order, amongst other things, to decide who to prosecute. Of course the respondent is not going to go back on his admissions that there are these grave errors, but what about the supervisor and others, the clerks and assistants? Counsel says: but the names of the supervisors in each ward are known because the respondent has exhibited the figures returned by each supervisor, and those figures bear the supervisor's initials on which he announces the results of the election. So be it, but those reports that have been put in in this court are no evidence against the respective supervisors; whereas if the order asked for is made, as I understand it, it will be seen at once which supervisor was responsible for each ward. It may be, for all I know, that not only will the supervisor be revealed, but there will be revealed those who were actually responsible for the counts. But be that as it may, it seems to me that this order is clearly required for the purposes of a prosecution for an offence against s. 51.

Finally there comes the matter of discretion. The county court judge, though he found it unnecessary to deal with this, said that if he had found it necessary he would not as a matter of discretion have made this order. Apparently what influenced him was the undoubted desire for secrecy. He thought the need for secrecy, as it were, outweighed the possible need for the administration of justice by means of a prosecution. For my part I am quite unable to accept that the

desire for secrecy is relevant in this context at all. Of course, the essential matter that has to be kept secret is how each voter in fact voted. I can see nothing secret whatever in allowing anybody, and the public in particular, to know what were in fact the true figures. There cannot be any secrecy in the totality of the votes, as opposed to how any particular person voted. Finally, secrecy is specifically provided for by r. 49 (2) itself, because it provides that this order can be made:

"... Subject to such conditions as to persons, time, place and mode of inspection, production or opening as the court making the order may think expedient and may direct the town clerk having custody of the ballot papers and the sealed packets of counterfoils and certificates to retain them intact for such period as may be specified in the order: Provided that in making and carrying into effect the order, care shall be taken that the way in which the vote of any particular elector has been given shall not be disclosed until it has been proved that his vote was given and the vote has been declared by a competent court to be invalid."

Counsel before this court has further urged that as a matter of discretion this order should not go, because he says the application is not a bona fide one. He says that the declared object of this application for an order is that Mrs. Bradbury should know for her own self-satisfaction that she came second, if it be the case, and not third. It is quite true that Mr. McWhirter has put forward submissions in favour of an order under this rule which have ranged wide; the benefit to the public to know what the real results were, the benefit to Mrs. Bradbury to know exactly where she was, and matters of that sort. That I fully appreciate, but they do not in the least suggest to me that what he has sworn in his affidavit and what Mrs. Bradbury has sworn in her affidavit is not the truth, namely the desire to prosecute. In all the circumstances of this case, I have come to the conclusion that it would be proper to make an order under r. 49 subject to conditions to be dealt with later.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Appeal allowed.

Solicitors: *T. D. Jones & Co.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ. AND O'CONNOR, J.)

November 7, 1968

R. v. WITHECOMBE

Road Traffic—Failing to provide specimen of blood or urine for laboratory test—Prior opportunity to provide sample of breath—Breathalyser—Proof that test device complied with statutory requirements—Road Safety Act 1967 (c. 30), s. 3 (3), s. 7 (1).

On a charge of failing to provide a specimen of blood or urine for a laboratory test, contrary to s. 3 (3) of the Road Safety Act, 1967, the prosecution must prove that the defendant had previously been given an opportunity to provide a sample of breath and that the apparatus used for this purpose complied with the requirements of s. 7 (1) of the Act.

APPLICATION by David Ernest Withecombe for leave to appeal against his conviction at Devon Quarter Sessions of failing to supply a specimen of blood or urine for a laboratory test contrary to s. 3 (3) (a) of the Road Safety Act, 1967, he being then ordered to pay a fine of £20 and disqualified from driving for 12 months for that offence and sentenced to six months consecutive imprisonment under s. 5 (3) of the Road Traffic Act 1962.

D. J. Trenner for the applicant.

J. B. S. Edwards for the Crown.

O'CONNOR, J., delivered the judgment of the court: On 14th May 1968, at the Devon Quarter Sessions the applicant was convicted of failing to provide a specimen of blood or urine for a laboratory test, contrary to s. 3 (3) (a) of the Road Safety Act 1967, and was sentenced to a fine of £20 and disqualified from driving for 12 months for that offence, and another six months consecutive under s. 5 (3) of the Road Traffic Act 1962; that is the totting-up procedure. He now applies for leave to appeal against his conviction.

The applicant had admittedly been drinking at a hotel in Bideford until closing time on Saturday, 30th December 1967, and after that he went to a private party at Instow. At 1.55 a.m. on 31st December he was driving a motor van and carrying a passenger, a man named Shears, in Bideford when police officers in a police vehicle noticed that the van was behaving rather oddly; it was hesitating at a road junction. They also noticed that there was no light illuminating the rear number plate and they decided to check the vehicle and its occupants. They overtook the vehicle. As they did so, they saw the driver's face, but he smartly turned off the road and by the time when the police officers had driven round the block the van had been parked and the occupants were out of it. They were in fact in a public lavatory from which they emerged a little later. The ignition key had been removed. A police officer asked the applicant whether he was the driver, to which he said no, that the driver had run off with the key, and when he was asked why he should have done that he made the cogent reply "Like me, he has had too much to drink". According to the constable's evidence, he then considered that he had cause to suspect that the applicant had alcohol in his body.

The police had no breath-testing equipment with them so they asked the applicant to go with them to the police station. This he agreed to do. When he arrived at the police station, he was requested to provide a specimen of breath for a test. The applicant refused and he said he was not the driver at the time. This happened at 2.20 a.m. The officer told him that he was under arrest and he replied that he was not driving. The police officers returned to the public convenience, found

the ignition key hidden behind a cistern, and returned and informed the applicant of the discovery, but he still denied that he was the driver. A 3.5 a.m. once again he was requested to provide a specimen of breath. This time he complied. The test proved positive. At 3.20 a.m. he was requested to provide a specimen of blood and told of the alternative courses open to him and warned that he would be liable to imprisonment, fine and disqualification if he refused. All the other formalities offering him part of the specimen were carried out correctly and he was requested to provide a specimen. This he refused to do. After that the rest of the matters prescribed by s. 3 (6) of the Act were followed. At each stage the applicant refused, viz., he refused to provide either blood or urine and at 5.00 a.m. he was charged with this offence.

It is necessary to look and see precisely how this matter comes about. I can state at the outset that the main ground of the applicant's appeal (it is unnecessary to deal with the large number of subsidiary grounds which may or may not have had any validity) is that the breath test device was not proved to have been approved by the Secretary of State as is required by the Road Safety Act 1967, and counsel for the Crown, who is present, has very properly told us that he cannot support the conviction because of the decision of the Divisional Court in *Scott v. Baker*, (1) which was decided on 14th May 1968 (the very same day as this trial was going on in Devonshire).

The scheme of the Road Safety Act 1967 is now rather well known. Where police officers have grounds to suspect that the driver of a motor car has got alcohol in his body or has committed a traffic offence which is defined in the statute, they are entitled to stop that driver and ask him to take a breath test either there or nearby—and I look at s. 2 of the Road Safety Act 1967, which is the section which requires the person to take the test. I need not read the section. By s. 7 (1) of the same Act "breath test" is defined and it means:

"... a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out, by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person;"

It will be remembered that this Act came into force on 1st October 1967. During the last three months of 1967 and the early part of 1968 police forces throughout the country had been issued with what can conveniently be called "breathalyser equipment". Cases began coming before the magistrates' courts in which the point was taken that the prosecution were required to prove, in order that there should be a valid test, that the actual apparatus used had been approved by the Secretary of State. Until an order was made in February 1968, the police forces throughout the country found themselves unable to do that. Various devices were adopted showing that they had been issued to police forces in the whole area (sometimes they had a label on them marked "Approved as required by the Secretary of State", which was not admissible as evidence) and the first case in which this question was substantively considered by a higher court was *Scott v. Baker* (1) in the Divisional Court in May 1968. It is convenient for the purposes of this decision that I should read the headnote of *Scott v. Baker* (1).

"On a charge before justices against the defendant for driving a motor vehicle having consumed alcohol in such a quantity that the proportion in his blood exceeded the prescribed limit contrary to section 1 of the Road Safety Act 1967, evidence was given by a constable that he suspected the defendant of having committed a traffic offence while the vehicle was in

motion and the defendant provided a specimen of breath for a breath test, and that the device by means of which the test was carried out indicated that the proportion of alcohol in his blood exceeded the prescribed limit; that the constable, pursuant to section 2 (4) arrested the defendant who, at the police station, was offered a breath test pursuant to section 2 (7), which he took and which also indicated an excess over the prescribed limit and thereupon he provided, under section 3, a specimen of blood which on analysis showed an alcohol content in excess of the prescribed limit. The constable deposed that the device used for the breath tests was known as an 'Alcotest 80' manufactured by Draeger Normalair Ltd., and the justices were referred to a circular letter purporting to be from the Home Office to police officers and others to the effect that, under section 7 (1), the Secretary of State had approved the 'Alcotest' device. The defendant contended that the evidence was insufficient to support a conviction in that the prosecutor had not proved the approval. The justices were of opinion that they had not previously heard that any type of device bore a name or had been approved, and they dismissed the information. On appeal by the prosecutor, it being conceded that the circular letter was inadmissible to prove approval:—

Held, dismissing the appeal, (i) that before a person could be convicted of an offence against section 1 of the Road Safety Act 1967, it had to be shown that the specimen was provided in accordance with section 3; and that, since the provision of a specimen by the defendant in accordance with section 3 depended not only on his arrest under section 2 (4), which in turn depended on a prior breath test, but also on an opportunity of having a second breath test in accordance with section 2 (7), the breath tests had to be carried out on a device approved by the Secretary of State in accordance with section 7 (1).

(ii) That, inasmuch as approval of the device by the Secretary of State was central to the offence and the principle *omnia praesumuntur* was a rebuttable presumption that had been challenged in a criminal case, approval of the device had to be proved by means other than the presumption. Accordingly, there being no other proof of approval, the justices had correctly dismissed the information."

The present case is on all fours with *Scott v. Baker* (1) up to the point where the applicant refused to give a specimen of urine. The requirement to do that is found in s. 3 (1) of the Road Safety Act 1967, which provides:

"A person who has been arrested under the last foregoing section [that is s. 2 of the Act] or s. 6 (4) of the principal Act may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under sub-s. (7) of the last foregoing section. . . ."

In the present case it will be remembered that only one breath test had been given. We are not making any decision as to the relevance of the failure to give two breath tests at the police station. He was in fact asked to have a breath test at an earlier time, which he refused, and later was requested to take a breath test again, which he did. But it will be seen that it is, as was said in *Scott v. Baker*, (1) an essential requirement for bringing in the procedure of calling for a specimen of blood or urine that a proper breath test has been taken. Under s. 3 (6):

"A person shall not be treated for the purposes of section 2 (1) of the 1962 Act or subsection (3) of this section as failing to provide a specimen unless—

(1) 132 J.P. 422; [1968] 2 All E.R. 993.

(a) he is first requested to provide a specimen of blood, but refuses to do so . . . ”

That was all carried out at the police station and so were the requirements of s. 3 (10). Section 3 (3) provides:

“ A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence and—

- (a) if it is shown that at the relevant time he was driving or attempting to drive a motor vehicle on a road or other public place, he shall be liable to be proceeded against and punished as if the offence charged were an offence under section 1 (1) of this Act; and
- (b) in any other case, if it is shown that at the time he was in charge of a motor vehicle on a road or other public place, he shall be liable to be proceeded against and punished as if the offence charged were an offence under section 1 (2) of this Act.”

We need not concern ourselves with the grounds of appeal which were subsidiary to the main one which were raised on the true construction of those two paragraphs in this case. It is enough to say that it is essential, before a person can be asked to give a sample of blood or urine, that he should have been given an opportunity to provide a sample of his breath on an apparatus which complies with the requirements of s. 7 of the Act. This it is conceded he had not been given because, through no fault of theirs, at the material time the prosecution were not in a position to prove that the breathalyser equipment which was available at the Bideford police station had been approved by the Secretary of State. In the opinion of this court there is no distinction to be drawn when considering the application of s. 7 (1) and s. 2 where the offence charged is a breach of s. 3 (3), viz., a failure to give a sample of blood or urine, as opposed to an offence charged under s. 1 (1) where a person has indeed given a sample of blood or urine, as in *Scott v. Baker* (1), which has been found to contain more alcohol than the prescribed limit.

In the circumstances, as it is impossible to distinguish this case from the decision of the Divisional Court in *Scott v. Baker* (1), counsel on behalf of the Crown has properly said that he cannot defend this conviction. We will treat the application as the hearing of the appeal and quash the conviction.

Conviction quashed.

Solicitors: *Toller, Oerton & Balsdon*, Bideford; *N. B. Jennings*, Exeter.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 25, November 8, December 6, 1968

DELAROY-HALL *v.* TADMAN

EARL *v.* LLOYD

WATSON *v.* LAST

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Disqualification—Discretion not to order—Special reason—Amount of excess only slight—Road Traffic Act, 1962 (10 & 11 Eliz. 2, c. 59), s. 5 (1)—Road Safety Act, 1967 (c. 30), s. 1 (1), s. 5 (2) (a).

On a conviction of driving a motor vehicle with a blood-alcohol proportion above the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, the fact that the amount of excess above the prescribed limit is only slight cannot constitute a special reason for not disqualifying the offender in accordance with s. 5 (2) (a) of the Act of 1967 and s. 5 (1) of the Road Traffic Act, 1962.

DELAROY-HALL *v.* TADMAN.

CASE STATED by the chairman of quarter sessions for the Inner London Area of Greater London.

On 7th February 1968 the [appellant], Peter Tadman, preferred an information against the [respondent], Geoffrey Vivian Delaroy-Hall, charging that he drove a motor vehicle on 18th January 1968 on a road called Crawford Street, London, W.1, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test of a specimen subsequently provided by the [respondent] under s. 3 of the Road Safety Act 1967, exceeded the prescribed limit at the time the specimen was provided, contrary to s. 1 (1) of the Act. The information was heard on 25th April 1968 by C. R. BEDDINGTON, Esq., a metropolitan magistrate sitting at Wells Street Magistrates' Court when the [respondent] pleaded guilty to the offence disclosed by the information, whereupon it was adjudged that the [respondent] for his offence should pay a fine of £15 and 15 guineas for costs, and it was further ordered that the [respondent] be disqualified for holding or obtaining a licence to drive a motor vehicle for a period of 12 months and that the particulars of his conviction be endorsed on any driving licence held by him.

From that decision the [respondent] appealed to the quarter sessions for the Inner London Area of Greater London by notice dated 8th May 1968 on the following grounds: that the order disqualifying him for holding or obtaining a licence to drive a motor vehicle for a period of 12 months was harsh and unjust in that the proportion of alcohol in his blood, viz., 96 milligrammes per 100 millilitres, was only slightly above the prescribed limit; in a case heard at the Luton Magistrates' Court a defendant had not been so disqualified for holding or obtaining a driving licence when the amount of alcohol proved to have been in his blood at the relevant time was 273 milligrammes per 100 millilitres; he had explained to the court a potential loophole in relation to the breathalyser test; and he had held a full driving licence for 30 years and a public service vehicle licence for approximately five years.

The following facts were found. On 18th January 1968, at 12.30 a.m. at Crawford Street, London, W.1, a motor car driven by the [respondent] was seen by police officers to draw away from the kerb and almost collide with a passing taxi cab; the [respondent] was stopped by the police officers and invited to take a breath test which proved positive; the [respondent] was arrested and taken to

Marylebone Lane police station where he was invited to take a further breath test which again proved positive; the [respondent] subsequently supplied a specimen of his blood which on analysis was found to contain not less than 96 milligrammes of alcohol per 100 millilitres of blood; the condition of the [respondent] was such that the police would not have charged him with driving a motor vehicle when unfit to drive through drink, contrary to s. 6 of the Road Traffic Act 1960.

The [respondent] gave evidence before the magistrate that between the hours of 8.0 p.m. on 17th January 1968 and 12.30 a.m. on 18th January, he had drunk four glasses of whisky with a large proportion of soda for the specific purpose of reducing the alcoholic content; and that between those hours he had also eaten a meal. The [respondent] accepted that the proportion of alcohol in his blood at the relevant time was 96 milligrammes per 100 millilitres.

It was contended on behalf of the [respondent] that he should not be disqualified for holding or obtaining a licence to drive a motor vehicle for any period on the grounds that he required a driving licence for his work and that the proportion of alcohol in his blood was only slightly in excess of the prescribed limit at the relevant time.

On the hearing of the appeal on June 5, 1968, on consideration of the facts and matters placed before him, the chairman allowed the appeal against the order of the magistrate to the extent that he reversed that part of the order whereby the respondent was disqualified for holding or obtaining a licence to drive a motor vehicle for a period of 12 months, pursuant to s. 5 (2) (a) of the Road Safety Act, 1967 and s. 5 (1) of the Road Traffic Act, 1962. The ground for his decision was that the fact that the proportion of alcohol in the respondent's blood at the relevant time was only 16 milligrammes per 100 millilitres in excess of the prescribed limit constituted a special reason for not ordering that the respondent be disqualified for holding or obtaining a licence to drive a motor vehicle within the meaning of the said s. 5 (1) of the Road Traffic Act, 1962. The prosecutor appealed.

D. H. Farquharson for the prosecutor.

The respondent appeared in person.

D. H. Vowden as amicus curiae.

EARL v. LLOYD.

CASE STATED by a metropolitan stipendiary magistrate.

On 19th April 1968, an information was preferred by the appellant, Harold Earl, against the respondent, Gordon Stewart Lloyd, charging that on 23rd March 1968 he drove a motor vehicle on a road called Queen Caroline Street having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provided a specimen under s. 3 of the Road Safety Act 1967, exceeded the prescribed limit at the time he provided the said specimen, contrary to s. 1 (1) of the Act.

On the hearing of the information at Wells Street Magistrates' Court on June 14, 1968, the following facts were found. At 3.05 a.m. on 23rd March, 1968, the respondent was seen by P.c. Parr and P.c. Frankton driving a Triumph Spitfire motor car (reg. no. AHJ 988B) south along Queen Caroline Street, W.6, which was a one-way street for traffic travelling north. At the junction of Talgarth Road and Queen Caroline Street, the motor car passed a traffic island on the offside and then turned left into Crisp Road, where it was stopped by the respondent on the direction of the said police constables. Save as aforesaid there was nothing wrong in the manner of the respondent's driving. On being asked by P.c. Parr if he realised

that he was driving in the wrong direction along Queen Caroline Street, the respondent replied that he was lost. P.c. Parr noticed that the respondent's breath smelt of alcohol and asked if he had been drinking, to which the respondent replied that he had had three glasses of claret. The respondent was then requested to take a breath test which proved positive, whereupon he was arrested by P.c. Parr and taken to Hammersmith police station. At 3.30 a.m., the respondent took a further breath test which again proved positive. After being warned of the consequences of failing so to do, the respondent agreed at the request of the appellant, who was a sergeant of the metropolitan police, to supply a specimen of his blood. At 3.55 a.m. Dr. Filer took a specimen of blood from the respondent which on analysis was found to contain not less than 108 milligrammes of alcohol in 100 millilitres of blood. The respondent who gave evidence on oath before the magistrate was an Australian who had been in this country for only a short time. He said in evidence that he was unaware of the prescribed limit of alcohol permitted for motorists and that in driving in the wrong direction down a one-way street he had been confused by the signs.

On consideration of the said facts as found by him, the magistrate convicted the respondent of the offence disclosed by the information and imposed a fine of £5 on him in respect thereof, and made an order that he should pay the sum of 12 guineas in costs; he further ordered that the particulars of the conviction should be endorsed on the respondent's driving licence in accordance with s. 7 of the Road Traffic Act 1962. The magistrate made no order under s. 5 (2) (a) of the Road Safety Act 1967 and s. 5 (1) of the Road Traffic Act 1962 disqualifying the respondent for holding or obtaining a driving licence for a period of not less than 12 months for the following special reason, viz., the triviality of the offence. The prosecutor appealed.

D. H. Farquharson for the prosecutor.

The respondent did not appear.

D. H. Vowden as *amicus curiae*.

WATSON v. LAST.

CASE STATED by a metropolitan stipendiary magistrate.

On 10th June 1968 at Marylebone Magistrates' Court, the respondent, John Last, was charged by the appellant, Tariq Watson, at Paddington police station with driving a motor vehicle on a road having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test of a specimen subsequently provided by the respondent under s. 3 of the Road Safety Act 1967, exceeded the prescribed limit at the time the specimen was provided, contrary to s. 1 (1) of the Act. The respondent pleaded guilty to the charge.

The appellant then recited the following facts in support of the charge: At 1.05 a.m. on 12th May 1968, the respondent was driving an Austin 1100 motor car east along Sussex Gardens, W.2, when Police Sgt. Mitchell observed that the nearside rear light of the motor car was not illuminated. Sgt. Mitchell spoke to the respondent and observed that his breath smelt of alcohol. The respondent was requested to take a breath test which proved positive. Sgt. Mitchell thereupon arrested the respondent and conveyed him to Paddington police station, where the appellant requested the respondent to take a further breath test which again proved positive. The respondent subsequently supplied a specimen of his blood which on analysis was found to contain not less than 82 milligrammes of alcohol in 100 millilitres of blood. The appellant informed the magistrate

that there were no previous convictions recorded against the respondent; and that there was no criticism of the way in which the respondent was driving immediately prior to his arrest.

The respondent contended that notwithstanding his plea of guilty to the said offence, the magistrate should not make an order disqualifying him for holding or obtaining a driving licence for a period of not less than 12 months or at all on the grounds that the proportion of alcohol in his blood was only slightly in excess of the prescribed limit of 80 milligrammes of alcohol per 100 millilitres of blood at the relevant time. The respondent referred to a decision of the chairman of the Inner London Quarter Sessions in the case of the respondent Delaroy-Hall where the chairman had allowed an appeal against an order disqualifying the respondent Delaroy-Hall for holding or obtaining a driving licence for 12 months for a similar offence, on the grounds that the alcohol content in the blood of the respondent Delaroy-Hall at the relevant time, viz., 96 milligrammes of alcohol per 100 millilitres of blood was only 16 milligrammes in excess of the prescribed limit. No evidence was given on oath before the magistrate by the respondent or any witness in support of the application that he should not be so disqualified.

On consideration of the facts and matters placed before him, the magistrate convicted the respondent of the offence and imposed a fine of £10 on him in respect thereof and made an order that he should pay the sum of 7 guineas in costs; he further ordered that the particulars of the conviction should be endorsed on the respondent's driving licence in accordance with s. 7 of the Road Traffic Act 1962. The magistrate made no order under s. 5 (2) (a) of the Road Safety Act 1967 and s. 5 (1) of the Road Traffic Act 1962 disqualifying the respondent for holding or obtaining a driving licence for a period of not less than 12 months for the following special reason: the amount of alcohol in the respondent's blood at the relevant time was only two milligrammes per 100 millilitres in excess of the prescribed limit. The prosecutor appealed.

D. H. Farquharson for the prosecutor.

The respondent did not appear.

D. H. Vowden as *amicus curiae*.

Cur. adv. vult.

Dec. 6. **LORD PARKER, C.J.**, read the judgment of the court: These three appeals were heard together and in each of them the same issue is raised, which can be stated in the following terms: When a person is convicted under s. 1 of the Road Safety Act 1967 of an offence of driving or being in charge of a motor vehicle when his blood-alcohol concentration exceeds the prescribed limit, can the amount of such excess constitute a special reason for not disqualifying him pursuant to s. 5 of the Act and s. 5 of the Road Traffic Act 1962? In each of the three appeals disqualification had not been ordered, although the amount of excess varied.

In *Delaroy-Hall's* case, the excess was 16 milligrammes and the chairman of the Inner London Sessions (reversing on this point the decision of the metropolitan magistrate) declined to order disqualification, stating as the grounds for his decision

"the fact that the proportion of alcohol in the blood at the relevant time was only 16 milligrammes for 100 millilitres in excess of the prescribed limit constituted a special reason."

In *Watson's* case, the excess was two milligrammes and a metropolitan magistrate (who was informed of the decision of the chairman of the Inner

London Sessions in *Delaroy-Hall's* case) declined to order disqualification, holding that a special reason was constituted by the fact that the amount of alcohol in the blood at the relevant time was only two milligrammes per 100 millilitres in excess of the prescribed limit. In *Earl's* case, the excess was 28 milligrammes and a metropolitan magistrate declined to order disqualification "for the following special reason, [viz.] the triviality of the offence".

When the appeals were first listed, the appellant prosecutor was in each case represented by counsel, but none of the respondents was legally represented. In view of the importance of the issue, the appeals were adjourned and when they came on for hearing counsel appeared as *amicus curiae*. The court is greatly indebted to both counsel for their careful arguments.

The Road Safety Act 1967 effected a major change in the law relating to the offence of driving a motor vehicle when under the influence of drink or drugs. Section 1 (1) of the Act (omitting words unnecessary for the purposes of this judgment) provides:

"If a person drives . . . a motor vehicle on a road . . . having consumed alcohol in such a quantity that the proportion thereof in his blood . . . exceeds the prescribed limit . . . he shall be liable [to the penalties set out in the subsection]."

The contrast between this provision and previously enacted provisions is too plain to require elaboration. As a result of the Act of 1967 a positive line is drawn for the purpose of marking the limit of the amount of alcohol which a driver may lawfully have in his blood when driving, and if that limit is exceeded, an offence is committed. The question whether the driver is adversely affected is of no moment when a court is considering whether a charge under s. 1 of the Act of 1967 has been proved: conviction or acquittal depends on the result disclosed by the test of the blood or urine supplied by the driver. Whatever else may be said for or against the Act of 1967, this much at least is clear, that it introduced an element of certainty into the law relating to drink and driving: either the blood-alcohol concentration is above the prescribed limit or it is not.

This approach to the problem is of particular importance when one has to consider the question of disqualification. If a person is convicted under s. 1 (1) of the Act of 1967, disqualification for at least 12 months is mandatory—

"unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified."

See s. 5 (2) (a) of the Act of 1967 and s. 5 (1) of the Road Traffic Act 1962.

It would no doubt have been possible to provide in the Act of 1967 that a conviction under s. 1 (1) should in every case be followed by disqualification, but this course was not taken and the reference to s. 5 of the Act of 1962 indicates that there may be cases in which, for special reasons, disqualification should not follow a conviction under s. 1 (1) of the Act of 1967. There is no need in this judgment to give examples of what might in law constitute special reasons, but it is perhaps right to express the opinion that cases in which a court may properly abstain from disqualifying are likely to be rare.

It is now well established that for the purposes of s. 5 of the Act of 1962 special reasons must relate to the offence as distinct from the offender: see the decisions of this court in *Rennison v. Knowler* (1) and *Williamson v. Wilson* (2). Disqualification in many cases results in hardship but as LORD GODDARD, C.J., said in *Williamson's* case:

(1) 111 J.P. 171; [1947] 1 All E.R. 302.

(2) 111 J.P. 175; [1947] 1 All E.R. 306.

"... it is not for the magistrates or for this court to question the wisdom of Parliament in imposing disqualification as a punishment."

Reference was naturally made to the well-known case of *R. v. Wickins* (1) in which DEVLIN, J., giving the judgment of the Court of Criminal Appeal, quoted the words of LORD GODDARD, C.J., in *Whittall v. Kirby* (2) and went on:

"If one takes the essence of that definition, there are four conditions there laid down which have to be satisfied. The first is that it must be a mitigating or an extenuating circumstance... The next is that it must not amount in law to a defence to the charge... The third is that it must be directly connected with the commission of the offence... [and] The fourth is that the matter is one which the court ought properly to take into consideration when imposing punishment."

It does not however follow that, if those conditions are satisfied, disqualification should not be ordered. The conditions were expressed as the minimum requirement before a court could properly abstain from imposing a period of disqualification otherwise mandatory. Moreover, even if the conditions are satisfied there may be some overriding reason, to be found, for example, in the legislation constituting the offence, which precludes a court from regarding as a special reason something which at first sight appears to fall within the scope of those four conditions. The cases now before this court afford a good example of such an overriding reason. Parliament has laid down a statutory limit of alcohol in the blood, 80 milligrammes per 100 millilitres of blood, no more, no less. At the same time it has laid down a mandatory penalty of disqualification. Just as the amount of the excess cannot affect the issue of guilt or innocence so also it is of no consequence in regard to disqualification. As has already been said, there may be facts which constitute special reasons, but the amount of the excess is not one of them: as counsel for the appellants put it, a special reason must be something other than the commission of the offence itself. This conclusion is strengthened by a consideration of what might be involved if the amount of the excess was held to be a special reason. In the three appeals now before the court the excess amounts were respectively 16, two and 28 milligrammes, which indicates plainly enough the variation in ideas that would result. Unless the line is drawn with certainty, it would be almost impossible to achieve any uniformity in practice and courts would be exercising a dispensing power which the Acts does not confer on them.

One possibility which was canvassed in argument was the application of what is commonly called the "de minimis" principle, particularly in relation to *Watson's* case, in which the amount of excess was only two milligrammes. If in any case the amount of the excess is truly minimal, this would, we hope, provide a good reason for not prosecuting the offender, but once the matter comes before the court, there is no room in this class of case for the principle of "de minimis". To introduce the principle would open the door to variability which the positive provisions of the Acts were designed to keep shut. The court was referred to the Scottish decision in *Smith v. Henderson* (3) in which the court had to consider special reasons for not endorsing a licence. At first sight it might seem that the court was prepared to hold that if there were only a "slight degree of blameworthiness" this would be a sufficient reason for not endorsing a licence, but when the report is fully examined, the true position

(1) (1958), 42 Cr. App. Rep. 236.

(2) 111 J.P. 1; [1946] 2 All E.R. 552; [1947] K.B. 194.

(3) 1950 S.C. (J.) 48.

appears to be that the real reasons held to justify non-endorsement related to the circumstances of the offence and not the blameworthiness of the offender. Quite apart from that, the issue raised in the three appeals now before this court is very different from that involved in the Scottish case. The result, as was announced at the end of the hearing, is that these three appeals are allowed. In *Delaroy-Hall's* case the disqualification imposed by the magistrate will again take effect, and will terminate 12 months from the date of the original hearing before him. The other two cases will be sent back to the respective magistrates with a direction in each case to disqualify for a period of not less than 12 months.

Appeals allowed.

Solicitors: *Solicitor, Metropolitan Police; Official Solicitor.*

T.R.F.B.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD PEARCE, LORD WILBERFORCE AND LORD PEARSON)

October 24, December 17, 1968

AVAIS v. HARTFORD SHANKHOUSE AND DISTRICT WORKINGMEN'S SOCIAL CLUB AND INSTITUTE, LTD.

Gaming—Gaming machine—Hiring to club—Legality—Weekly rent—Guarantee by owner to hirers of specified profit—"Application" of "stakes hazarded"—Betting, Gaming and Lotteries Act, 1963, s. 33 (2) (c), s. 54 (1).

By s. 33 of the Betting, Gaming and Lotteries Act, 1963: "(1) Section 32 of this Act shall not apply to gaming by means of a gaming machine, but, subject to the provisions of this Act, if any such gaming takes place on any premises to which, whether on payment or otherwise, the public have access, or which are used wholly or mainly by persons under the age of eighteen years, or, except in accordance with the conditions set out in sub-s. (2) of this section, on any other premises—(a) any person who knowingly allowed the premises to be used for the purpose of the gaming; and (b) any other person who, knowing or having reasonable cause to suspect that the premises would be used for such gaming—(i) caused or allowed the machine to be placed on the premises; or (ii) let the premises, or otherwise made the premises available, to any person by whom an offence in connection with the gaming was committed, shall be guilty of an offence. (2) The conditions referred to in the foregoing subsection are—(a) that not more than two gaming machines are made available for play in any one building or, where different parts of a building are occupied by two or more different persons, in the part or parts of the building occupied by any one of those persons; and (b) that the stake required to be hazarded in order to play the game once does not exceed sixpence; and (c) that all stakes hazarded are applied either in the payment of winnings to a player of the game or for purposes other than private gain. (3) In this section—(a) the expression 'gaming machine' means a machine for playing a game of chance, being a game which requires no action by any player other than the actuation or manipulation of the machine; and (b) the expression 'building' includes the curtilage of the building."

By s. 54: "(1) In construing s. 33, 37, 43 or 48 of this Act, proceeds of any entertainment, lottery, gaming or amusement promoted on behalf of a society to which this subsection extends which are applied for any purpose calculated to benefit the society as a whole shall not be held to be applied for purposes of private gain by reason only that their application for that purpose results in benefit to any person as an individual. (2) For the purposes of the said ss. 33, 37 and 48, where any payment falls to be made by way of a hiring, maintenance or other charge in respect of a gaming machine within the meaning of the said s. 33 or in respect of any equipment for holding a lottery or gaming at any entertainment,

then, if, but only if, the amount of that charge falls to be determined wholly or partly by reference to the extent to which that or some other such machine or equipment is used for the purposes of lotteries or gaming, that payment shall be held to be an application of the stakes hazarded or proceeds of the entertainment, as the case may require, for purposes of private gain; and, accordingly, any reference in the said s. 37 or 48 to expenses shall not include a reference to any such charge falling to be so determined. (3) Subsection (1) of this section extends to any society which is established and conducted either—(a) wholly for purposes other than purposes of any commercial undertaking; or (b) wholly or mainly for the purpose of participation in or support of athletic sports or athletic games; and in this section the expression 'society' includes any club, institution, organisation or association of persons, by whatever name called, and any separate branch or section of such a club, institution, organisation or association."

The appellant sued the respondents for damages for breach of contract in that they had refused to take delivery of two fruit machines in pursuance of a hiring agreement in writing between the parties dated July 25, 1965. The respondents admitted the agreement as a purported agreement and that they refused to take delivery of the fruit machines, but they pleaded that the purported agreement was illegal and void as containing provisions contravening the Betting, Gaming and Lotteries Act, 1963, and in particular s. 33 thereof. The respondents were a working men's club.

Clause 1 of the agreement provided that the appellant (referred to as "the owner" or "the owners") should let and the respondents (referred to as "the hirer") should take on hire two fruit machines for a period of 36 calendar months commencing on Aug. 1, 1965, at a rental of £12 per week payable in advance, and the hiring was to continue thereafter until the respondents gave not less than six months' notice of termination. Clause 2 provided that the appellant should maintain the machines in good working order and the respondents should pay to him by way of additional rent the sum of 2s. per week payable in advance for such maintenance. Clause 10 was in these terms: "The owners guarantee to the hirer that the earnings from fruit machines for the hirer shall be £1,900 per annum. Failing that the owners agree to pay to the hirer a certain sum of money that brings the total earnings of the hirer to £1,900 per annum. It is also agreed between the owners and the hirer that the owners shall not charge any rent for the machine to the hirer for the first six months and in return the owners will not be held responsible if the earnings of the fruit machines do not reach the guaranteed figures." There was also an oral agreement, made between the parties on the same day as the written agreement, that the appellant should retain the keys of the machines. He would thus be able to count the money coming out of the machines.

On Aug. 1, 1965, the appellant called with the machines and was met by officials of the respondents, who simply said that since the last time he had been there they had "changed their frame of mind" and would not accept the machines. He had bought two new machines for the purpose of supplying them to the respondents at a cost to him of some £600 and he was left with those two machines on his hands for some time. It was not until May, 1966, that he was able to place them elsewhere. As the respondents refused to take delivery of the machines, there was no performance of the hiring agreement.

HELD: the "stakes hazarded" were "applied" within s. 33 (2) (c) partly in payment of winnings to successful players, the balance remaining, which was "proceeds" within s. 54 (1), not being "applied" to any purpose until it was used or allocated in some way; on that view of the meaning of "applied" the performance of the hiring agreement would not have involved any application of any part of the stakes hazarded for the private gain of the appellant, for, if there were any private gain to him, it would occur when the stakes hazarded became earnings of the respondents and so reduced his liability under the guarantee, and the subsequent application of the money made no difference to his position; the application of the earnings for the general purposes of the respondents so as to benefit their members would, under s. 54 (1), not be reckoned as application for purposes of private gain; therefore, the performance of the hiring agreement would have complied with the conditions in s. 33 (2), and the agreement was not illegal or void.

Decision of Court of Appeal (132 J.P. 77) reversed.

APPEAL by Mohammed Avais, against a decision of the Court of Appeal (LORD DENNING, M.R., and DIPLOCK, L.J., LORD UPJOHN dissenting), reported 132

J.P. 77, reversing the decision of WALLER, J., who upheld the claim of the appellant for damages against the respondents, the Hartford Shankhouse and District Workingmen's Social Club and Institute, Ltd., for loss sustained by reason of the respondents' refusing to take delivery of two fruit machines under an agreement dated July 25, 1965.

P. M. Taylor, Q.C., and D. A. Orde for the appellant.

C. A. Settle, Q.C., and P. A. W. Merriton for the respondents.

Their lordships took time for consideration.

December 17, 1968. The following opinions were delivered.

LORD REID: For the reasons given by my noble and learned friend, LORD PEARSON, I would allow this appeal.

LORD MORRIS OF BORTH-Y-GEST: For the reasons given by my noble and learned friend, LORD PEARSON, I would allow this appeal.

LORD PEARCE: For the reasons given by my noble and learned friend, LORD PEARSON, I would allow this appeal.

LORD WILBERFORCE: For the reasons given by my noble and learned friend, LORD PEARSON, I would allow this appeal.

LORD PEARSON stated the facts as set out in the headnote and continued: The question which arises is whether the performance of the agreement according to its tenor would have involved the commission of an offence or offences under s. 33 of the Act of 1963 read in conjunction with s. 54 of that Act. The answer to the question depends on the true construction of certain provisions of those sections, taking into account both the words used and (at any rate if there is ambiguity in the words used) any inference which may properly be drawn as to the policy intended to be effectuated.

Of the conditions set out in s. 33 (2), conditions (a) and (b) were undoubtedly complied with. The dispute is whether, as required by condition (c) read in conjunction with s. 54 (1), "all stakes hazarded" would have been "applied either in the payment of winnings to a player of the game or for purposes other than private gain". WALLER, J., held that this condition was complied with. The Court of Appeal, by a majority, reversed his decision, holding that after the first six months the stakes hazarded, or the part of them not paid out to the players as winnings, would go to relieve the appellant of his liability under the guarantee, and so enable him to avoid a loss and so constitute a private gain to him. *Payne v. Bradley* (1) was cited and relied on.

That case was decided under s. 4 of the Small Lotteries and Gaming Act, 1956. One of the conditions of legality for certain entertainments was that the whole of the proceeds were "applied for purposes other than purposes of private gain". The proceeds of the "tombola" in that case were paid into the general funds of the club. It was held by a majority of their Lordships that there was an application of the proceeds for the private gain of the members of the club, because the proceeds would be used to finance the activities and amenities of the club to the benefit of the members and would make it unnecessary to increase the subscriptions payable by the members. The position, however, is different under the Act of 1963, because it includes s. 54 (1) and there was no similar provision in the Act of 1956.

I think the first point to be considered in this present case relates to the meaning and effect of the word "applied" in s. 33 (2) (c), because the respondents have

(1) 125 J.P. 514; [1961] 2 All E.R. 882; [1962] A.C. 343.

contended, and the majority of the Court of Appeal decided, that under the agreement the money would be *applied* for purposes of private gain of the appellant. There is normally a fairly clear distinction between the receipt of income and the application of it to "purposes". There is no evidence as to the internal mechanism of the machines or what would happen to the sixpences inside the machines: it may be that so long as they remained in the machines they would be available for payment of winnings: but at any rate they would be received by the respondents and would constitute earnings when they were taken out of the machines. In my opinion, the "application" of the earnings would come after that. They might be used in payment for goods supplied or in payment of wages or salaries or otherwise, or they might be allocated to the general purposes of the respondents by being paid into their general bank account. It is that use or allocation which would constitute the "application" of the earnings. It is to be noted that s. 33 (2) (c) speaks of the application of "all stakes hazarded". The stakes hazarded are partly applied in payment of winnings to the successful players, and I think the balance remaining is (at any rate when it is taken out of the machines) "earnings" within cl. 10 of the hiring agreement and "proceeds" within s. 54 of the Act of 1963, and it is not "applied" to any purpose until it is used or allocated in some way. That interpretation seems to me to give to the word "applied" its natural and ordinary meaning. Also it is supported by the language of s. 54 (1) and (2). In sub-s. (1) it is the proceeds that are "applied" to "purposes" and in sub-s. (2) it is the payment of the hiring or other charges which is to be held an "application" of the stakes hazarded or proceeds of the entertainment.

On that view as to the meaning of the word "applied" the performance of the hiring agreement would not have involved any *application* of earnings or of any part of the stakes hazarded for the private gain of the appellant. If there was a private gain to the appellant, it would occur at the moment when the stakes hazarded became earnings of the respondents and so reduced his liability under the guarantee. The subsequent application of the money would make no difference to his position. The application of the earnings for the general purposes of the respondents so as to benefit their members would by virtue of s. 54 (1) of the Act of 1963 not be reckoned as application for purposes of private gain. Accordingly, performance of the hiring agreement would have complied with condition (c) as well as conditions (a) and (b) in s. 33 (2) of the Act of 1963, and, therefore, the hiring agreement was not illegal or void. I agree with the dissenting judgment of LORD UPJOHN in the Court of Appeal.

It was, however, argued on behalf of the respondents that so much of the stakes hazarded as were not paid out as winnings to the successful players would be "applied" by being taken out of the machines, being thus converted into earnings. For the reasons given above I do not think it is right to say that there would be an "application" of money for "purposes" at that stage, when the money was only being received and constituted mere takings which would be afterwards used or allocated for some purpose or purposes. But be it supposed that the argument is correct. If the money was applied for some purpose at the moment of being taken out of the machines, what would the purpose be? I think the answer must be that, on this hypothesis, the money would be proceeds of the gaming being applied as earnings of the respondents, and therefore, for a purpose calculated to benefit the respondents' club as a whole. Then s. 54 (1) would operate. The proceeds so applied should not be held to be applied for purposes of private gain by reason only that their application for that purpose resulted in benefit to any person as an individual. Accordingly, the fact that the appellant would derive some benefit, by way of reduction or extinction of his liability under the guarantee,



from the application of the proceeds of the gaming as earnings of the respondents and, therefore, for a purpose calculated to benefit the respondents' club as a whole would not cause a non-compliance with condition (c) and would not render the gaming illegal. This is an alternative ground on which it might be held that the hiring agreement was not illegal or void.

As to the policy of s. 33 and s. 54 of the Act of 1963, I think the question whether, and to what extent, persons should be prevented or hindered from spending or wasting their money in fruit machines (paying sixpence for a chance that is worth less than sixpence) is a question of policy to be decided by Parliament. Parliament has decided that such gaming shall be lawful if certain conditions are complied with. The task of the courts is to ascertain in any particular case whether the conditions have been (or, as in this case, would be) complied with or not. There is no evident reason for interpreting the conditions otherwise than according to their natural meaning. Indeed, there is this point to be borne in mind in favour of a literal construction. If the conditions are not complied with, the club officials who allow the club premises to be used for the gaming are guilty of criminal offences. The Act would be setting a trap for them, if by some artificial construction of the provisions an apparently innocent financial agreement (such as accepting from the owner of the machines a guarantee of the club's takings) were held to involve or lead to a breach of the conditions.

In my opinion, the appeal should be allowed and the judgment of WALLER, J., should be restored.

Appeal allowed.

Solicitors: *Ward, Bowie & Co.; Douglas-Mann & Co.*

G.F.L.B.

COURT OF APPEAL (CIVIL DIVISION)

(HARMAN AND SALMON, L.JJ., AND BAKER, J.)

October 3, 1968

Re E. (P.) (an infant)

Adoption—Illegitimate child—Application by mother and her husband—Opposition by putative father—Advantage to child of ceasing to be illegitimate outweighing loss of connection with real father.

A single girl aged about 18 gave birth to a boy in October, 1965. In February, 1966, a magistrates' court made an affiliation order in her favour and ordered that the father should have access to the child for two hours each Sunday morning. The father was a devoted father, saw the child each week, and asked the mother to marry him. She refused, and, in August, 1967, married another man. The child thereafter lived with, and was brought up by, the mother and her husband. Later they had a child of their own. In January, 1968, the mother and her husband applied to adopt the boy. The father opposed the application, and, in March, 1968, applied under the Guardianship of Infants Acts, 1886 and 1925, for custody of the boy. The father did not question the suitability of the would-be adopters, but he wished to maintain connection with his child and to attend to his education.

HELD: the advantages for the child of being adopted, and thereby ceasing to be illegitimate, outweighed the loss of his connection with his real father, and, therefore, an adoption order should be made and the application for custody dismissed.

APPEALS from an order of PENNYCUICK, J., and from an adoption order made in Workington and Cockermouth County Court.

The father of an illegitimate boy appealed from an order of PENNYCUICK, J., dismissing his appeal from an order of DEPUTY JUDGE PETCH, at Workington and Cockermouth County Court, refusing his application for the custody of the boy. PENNYCUICK, J., gave no reasons for dismissing the appeal, because he considered it better that the Court of Appeal should consider it *de novo*, together with an appeal by the father from an adoption order made by DEPUTY JUDGE PETCH on the same date at the same court for the adoption of the boy by the respondents, the boy's mother and her husband.

S. Seuffert, Q.C., and P. G. Smith for the father.

Charles Sparrow, Q.C., and R. G. Hamilton for the mother and her husband.

HARMAN, L.J.: These are two related appeals which we have heard together. One of them is an appeal under the Guardianship of Infants Acts 1886 and 1925, and the other under the Adoption Act 1958. The result has been a certain procedural difficulty which has deprived us of the advantage of PENNYCUICK, J.'s views on the matter, he having thought it better not to interfere in the one case, and he had no jurisdiction so to do in the other. However, in this court, as far as that is concerned, it is all plain sailing and, in effect, this is an appeal from the county court judge's order.

The applicant (the appellant here) is the father of an illegitimate child born in October 1965; to him the justices, in February 1966, gave an order for access on Sunday mornings for two hours. They made an affiliation order at the same time in favour of the mother for 30s. a week. She was a girl then of about 18. In August 1967, she married. She had for some time been hostile to the father. She refused to marry him both before and after the child was born and had continued in that refusal until she married another man in August 1967. In January 1968, she and her husband took out adoption proceedings in respect of this child. The child of course has always lived with the mother and has now become a member of the new family, the mother having a child by her husband. In March 1968, by way of counterblast to this adoption application, the father applied for custody under the Guardianship of Infants Acts. He did not want custody; he knew that he would not get custody; but that was the only way in which he could bring himself on to the stage on a footing equal to that of the mother because, as is well known, under the Adoption Act 1958, although the mother can veto an adoption (unless declared by the court to be unreasonable) the father of an illegitimate child has no such right, though he has a right to be heard and to make representations.

The position, therefore, is an odd one, for the father objects to the adoption, not because there is anything unsuitable about the adopters—they are admittedly respectable, decent people, well able to look after the child in the state of life to which he is accustomed—but because he will lose his rights of access under the magistrates' order as the child will cease to be his child and he will have no legal status at all. The objection is a curious one. It is not because of the unsuitability of the adoption in itself; it is because the father wishes to maintain his connection with the child. He says that it is better for the child that it should remain under the stigma of bastardy because there will be compensations in the fact that he will keep in touch and will, as he says, later on send the boy to a grammar school if he is bright enough. The mother not unnaturally objects. She says—or it is said on her behalf; she is still an infant and represented by her husband—that this child is being brought up in the house as one of the family and his position ought to be regularised as soon as possible, and that the best thing for him is to make a clean cut; and the judge has so found.

I for my part do not feel any hesitation in saying that I think that the judge was right. It is quite true that the father has shown himself a devoted father—so far as he can; two hours a week—and wishes to maintain himself in the picture. But I cannot think that in so doing he is considering the real advantages of the child. What he is doing is to forward his own pleasure. He has the pleasure at present of paternity without the trouble of bringing the child up. Two hours a week on Sunday morning is an agreeable interlude in his life, and that he wishes should continue. It does not seem to him to matter that the child will remain a bastard. The effect of the Adoption Act 1958, is to remove that stigma, so far as it can be removed, and to give children in that unfortunate position a fresh start in life without the slur attaching to their origin. I cannot help thinking that so solid an advantage certainly ought not to be thrown away in order that the father may have the pleasure of seeing the child and dandling him on his knee two hours a week on Sunday morning before he goes off to play football.

It is said that the judge paid insufficient attention to the evidence of a psychiatrist. I wish to say as little as I can about that. The psychiatrist, as usual, only saw one side; he never saw the mother or her husband, and he, as he says, "acted on his brief". I cannot think that his opinions, under those circumstances, ought to have weighed very heavily with the judge—indeed, I think they did not—and I for one endorse that point of view. This is a question of fact—what is the best for the child? It is best for the child that he should be adopted and become so far as possible a respectable member of society, and I would, therefore, dismiss both appeals, for if the adoption is made, the question of custody or access for the father must fall with it because he will necessarily lose any standing in the matter whatever and the child will, as in all adoption cases, be deprived of his real father. Counsel for the father says that that is very shocking; but it is the inevitable result of all adoptions. I for one think that the advantages much outweigh any disadvantages that there may be, and I would, therefore, dismiss these appeals.

SALMON, L.J.: I agree.

BAKER, J.: I also agree.

Appeals dismissed.

Solicitors: *Beachcroft & Co., for Curwen & Co., Workington; Collyer-Bristow & Co., for Paisley, Falcon & Hight, Workington.*

H.S.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

October 31, 1968

RETARDED CHILDREN'S AID SOCIETY v. LONDON BOROUGH OF BARNET

Mental Health—Home for mentally retarded children—Registration—"Refusal to re-register"—Application to local authority for permission to accommodate more children—Permission to accommodate fewer children than requested—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 37 (3)—Mental Health Act, 1959 (7 & 8 Eliz. 2 c. 72), s. 20.

The appellants, a charity, maintained three homes for mentally retarded children. In July, 1966, they received a certificate stating that the houses had been registered pursuant to s. 37 of the National Assistance Act, 1948, as applied by Part 3 of the Mental Health Act, 1959, subject to the condition that the number of persons accommodated in each house should not exceed stated numbers. In September, 1967, they applied to the local authority to have the conditions changed so as to enable them to accommodate larger numbers of children in two of the houses. In February, 1968, the local authority granted them permission to accommodate more children in each house than originally permitted, but fewer than the appellants had wished to accommodate. The appellants appealed to a magistrates' court under s. 38 of the National Assistance Act, 1948, by complaint alleging that the local authority's decision constituted an order refusing to re-register. The justices held that they had no jurisdiction to hear the complaint and dismissed it.

HELD: that the decision of the justices was right, as the application of the appellants was not an application to re-register the premises, but an application for change in the conditions of the existing certificate of registration, and under s. 37 (3) of the National Assistance Act, 1948, an appeal lay to a magistrates' court only where there had been a refusal to register.

Per ASHWORTH, J.: There is nothing in s. 20 of the Mental Health Act, 1959, which suggests that any conditions imposed by the local authority could be challenged.

CASE STATED by justices for the Middlesex Area of Greater London.

The appellants, the Retarded Children's Aid Society, Ltd., made a complaint that they were aggrieved by a decision of the respondents, the mayor, aldermen and burgesses of the London Borough of Barnet, in respect of a residential home for mentally disordered persons carried on at 102 and 104 Leicester Road and 2 Warwick Road, New Barnet, pursuant to s. 37 of the National Assistance Act 1948, as applied by Part 3 of the Mental Health Act 1959, and under the National Assistance (Conduct of Homes) Regulations 1962*. The appellants appealed to the magistrates' court under s. 38 of the National Assistance Act 1948 for an order that the respondents re-register the said home. The complaint was heard at Barnet Magistrates' Court on March 21, 1968, on the preliminary point whether the justices had jurisdiction to hear the complaint. The following facts were found: In July, 1966, the respondents issued a certificate of registration in respect of the home. The certificate set out the condition, *inter alia*, that the number of girls over 14 years of age at 102 Leicester Road, should not exceed three. On September 6, 1967, the appellants sent to the respondents an application (dated September 1) to accommodate three boys over 16 years and eight boys between five years and 16 years at 2 Warwick Road, and by another application of the same date to accommodate five girls over 14 years at that address. On January 22, 1968, the respondents through their Health Committee passed a resolution allowing the appellants to accommodate four girls over 14 years at 102

* S.I. 1962 No. 2000.

Leicester Road, but refusing them permission to accommodate any boys over 16 years at 2 Warwick Road. The respondents communicated this resolution to the appellants by a letter dated February 2, 1968. The appellants complained to the Barnet Magistrates' Court on February 21, 1968. It was contended on behalf of the appellants that the effect in law of the resolution and the letter of 2nd February, was an order refusing the re-registration as applied for and that, as persons aggrieved by the refusal, they were entitled to appeal to the magistrates' court by virtue of s. 38 of the National Assistance Act 1948, and s. 300 to s. 302 of the Public Health Act 1936. It was contended on behalf of the respondents that their decision did not constitute an order refusing to re-register but was a decision to grant re-registration on conditions that they were entitled to impose by virtue of s. 20 of the Mental Health Act 1959, and that, in the circumstances, there was no right of appeal. The justices dismissed the complaint and the appellants appealed.

J. Sarch for the appellants.

D. R. Woolley for the respondents.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the Middlesex Area of Greater London, who dismissed complaints preferred by the appellants against the respondents in regard to the latter's alleged failure to re-register the appellants' premises as a residential home for mentally disordered persons. What happened was this: the appellants are a charity who run three houses for mentally retarded children at 2 Warwick Road, at 102 Leicester Road and at 104 Leicester Road, and under the National Assistance Act 1948 as applied by the Mental Health Act 1959, they applied for registration. On 6th July, 1966, they received a certificate in this form:

" This is to CERTIFY that The Retarded Children's Aid Society, Ltd., of 21 East End Road, Finchley, N.3, carrying on a Residential Home for Mentally Disordered Persons at No. 2 Warwick Road, and Nos. 102 and 104 Leicester Road, New Barnet in the London Borough of Barnet, has been registered in respect of the said home by the Council of the London Borough of Barnet in pursuance of section 37 of the National Assistance Act 1948, as applied by Part III of the Mental Health Act 1959. It is a condition of the said registration that the number of persons kept at any one time in the house (excluding persons carrying on or employed in the home and their families) shall not exceed 22 children between the ages of five and sixteen years in the two houses No. 2 Warwick Road and No. 104 Leicester Road, New Barnet and shall not exceed three girls over the age of fourteen years in the house No. 102 Leicester Road, New Barnet . . . "

There was a registration subject to certain conditions. On 6th September 1967, the appellants desired to have the conditions changed, as it were, so as to enable them to house at 102 Leicester Road five girls over 14, and at 2 Warwick Road, three boys over 16 and eight boys under 16. Accordingly, they applied by letter of that date enclosing a rather long complicated form filled up in respect of those two houses asking for registration in that form, that is to say registration with the conditions changed. On 2nd February, 1968, however, the respondents, by their town clerk, wrote back and did not give the appellants all for which they asked. Whereas in the case of 102 Leicester Road, they had asked to accommodate five girls over 14, they were told they could only accommodate four girls over 14, and in respect of 2 Warwick Road, where they asked for three boys over 16 and eight boys under 16, they were told they could only have 11 boys between five and 16, in other words no boys over 16 years of age. They

were aggrieved; they had not got what they wanted and they sought to appeal to the justices. It was in those circumstances that the justices, as I have said, held that they had no jurisdiction to consider the complaint.

In order to arrive at a conclusion in this case it is necessary to examine the relevant statutes in a little detail. The National Assistance Act 1948, by Part 4, and particularly s. 37 to s. 40 inclusive, dealt with the registration of homes for disabled persons and the aged, and charities for disabled persons. This was, of course, before the Mental Health Act 1959, and in regard to homes for disabled persons it provided by s. 37 for registration; sub-s. (1) made it an offence to carry on such a home without registration. Subsection (2) provided for the application being made to the registration authority, that is the council of the county, county borough or large borough in the area in which the home is situated accompanied by a fee of 5s. Subsection (3) provides that:

"Subject to the provisions of this section the registration authority shall, on receipt of an application under the last foregoing subsection, register the applicant in respect of the home named in the application and issue to him a certificate of registration: Provided that the authority may by order refuse to register the applicant if they are satisfied—(a) that he or any person employed or proposed to be employed by him in the management of the home or any part thereof is not a fit person, whether by reason of age or otherwise, to carry on or to be so employed at a home of such a description as the home named in the application; "

or by para. (b) that the accommodation staffing or equipment is insufficient, or by para. (c) that the way in which it is proposed to conduct the home is such that proper services and facilities will not be provided.

By s. 38 it is provided first of all that, before an order for refusal to register is made the applicant must be told of the intention to refuse and enabled to make representations. Finally, by sub-s. (4) it is provided that:

"A person aggrieved by an order refusing an application for registration under the last foregoing section or cancelling any registration thereunder may appeal to a court of summary jurisdiction having jurisdiction in the place where the home in question is situated . . ."

Subsection (5) invokes the Public Health Act 1936 for procedure, which is by way of complaint.

I am dealing only for a moment with the National Assistance Act 1948; in the light of the provisions that I have read it is perfectly clear, pausing there, that the only right of appeal to justices is if there has been an order for refusal which, in turn, can only be made within the exceptions provided in s. 37 (3), in other words, what the justices may be called on to deal with is whether the applicant is a fit person, whether the premises are suitable, and whether proper facilities will be provided. But, of course, the matter does not end there, it is not as simple as that, because when one comes to the Mental Health Act 1959, s. 19 invokes those provisions of the National Assistance Act 1948 in relation to residential homes for what are called mentally disordered persons. Section 19 (1) provides that:

"Subject to the provisions of this and the next following section, sections thirty-seven to forty of the National Assistance Act 1948 (which relate to the registration, inspection and conduct of homes for disabled persons and old persons) shall apply in relation to a residential home for mentally disordered persons as they apply in relation to homes to which those enactments applied immediately before the commencement of this Act."

Then s. 20 provides:

"(1) It shall be a condition of the registration of any person in respect of a residential home for mentally disordered persons that the number of persons kept at any one time in the home (excluding persons carrying on or employed in the home and their families) does not exceed such number as may be specified in the certificate of registration; and without prejudice to the foregoing provision, the registration may be effected subject to such conditions (to be specified in the certificate) as the registration authority consider appropriate for regulating the age, sex or other category of persons who may be received in the home. If any condition imposed by or under subsection (1) of this section is not complied with, the person carrying on the home shall be guilty of an offence . . ."

The point, as I see it, is that when an appeal is given on an order refusing an application for registration, is the application which is refused an application for registration simpliciter, or is it an application for a particular number of persons of a particular age and so on to be accommodated in the premises to be registered? I confess that I do not find this an easy question, and my mind has wavered during the course of argument with a strong feeling that there ought to be an appeal to the justices against what I may call the conditions, otherwise it can be said that the respondents can impose purely arbitrary conditions.

If on the other hand the respondents are right, as the justices have held, the only appeal to them is in relation to the circumstances in which there can be an order of refusal under s. 37 (3); that the appellants are unfit persons, and so on. However, after considering the legislation, I have come to the conclusion, though with some reluctance, that the justices and the respondents were right. It seems to me that here one has provisions for registration with a heavy penalty for carrying on a home which is not registered, and one has conditions which may be imposed and for breach of which there are also penalties, but smaller penalties. The application, as I see it, is an application for registration; no doubt as a matter of convenience the appellants ask for the conditions which they hope will be imposed, but their application is really for registration, and to take the present case, their application was not really an application to re-register; it was an application for a change in the conditions; they were registered throughout.

I confess I have come to this conclusion with some reluctance, but I am happy to think that this court can control local authorities should they seek to act unreasonably or arbitrarily along the lines laid down by LORD GREENE, M.R. in the well-known passage in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (1). I think that the justices came to a correct conclusion in this case, and I would dismiss the appeal.

ASHWORTH, J.: I agree. I would only add one or two comments in regard to the Mental Health Act 1959, which is really the Act that particularly applies to these premises. Before s. 20 of that Act was passed, there was a power in regard to similar homes controlled under the National Assistance Act 1948 to impose conditions; that was to be found in s. 40. This court has not found it necessary to look into that because such conditions and regulations would not be applicable to the present premises. But when the Mental Health Act 1959 was passed and dealt with residential homes in s. 19 and s. 20, special provision was made in s. 20 regarding conditions and the consequence of failure to comply with them. To my mind it is startling if the appellants' contentions are right, that one finds nothing in s. 20 to suggest that there is any way by

(1) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

which a registered person, or would-be registered person, can challenge the conditions imposed by the authority. One would have expected that if this imposition of conditions by the respondents was to be subject to review, something at least would have been put into s. 20 to that effect, but there is nothing there, and in my view there is no means by which the appellants can achieve what they set out to achieve, namely a review of the conditions imposed by the respondents. I agree that this appeal fails.

WILLIS, J.: I agree with both judgments; I have nothing which I could usefully add.

Appeal dismissed. Leave to appeal granted.

Solicitors: *A. S. Cohen & Co.; R. H. Williams.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND FENTON ATKINSON, L.JJ. AND THOMPSON, J.)

December 2, 1968

R. v. JONES

Criminal Law—Quarter sessions—Committal for sentence—Committal a nullity—Right of appeal to Court of Appeal—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2 c. 55), s. 18 (1), s. 29.

By s. 29 of the Magistrates' Courts Act, 1952: "Where on the summary trial under s. 18 (3) or s. 19 of this Act of an indictable offence triable by quarter sessions a person who is not less than seventeen years old is convicted of the offence, then, if on obtaining information about his character and antecedents the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, instead of dealing with him in any other manner, commit him in custody to quarter sessions for sentence in accordance with the provisions of s. 29 of the Criminal Justice Act, 1948."

The appellant was charged at a magistrates' court with driving while disqualified, contrary to s. 110 of the Road Traffic Act, 1960, as amended. The prosecution applied for summary trial under s. 18 (1) of the Magistrates' Courts Act, 1952, and the justices acceded to the application. The appellant pleaded guilty and the justices committed him to quarter sessions for sentence under s. 29 of the Act of 1952. The committal was a nullity, because s. 29 contained no provision for committal under s. 18 (1). The appellant was sentenced at quarter sessions to imprisonment and disqualification and appealed against sentence.

HELD: the Court of Appeal had no jurisdiction to hear the appeal, as the committal was a nullity, and the proper procedure was to challenge the committal by an application for an order of certiorari.

APPEAL by Gwyn Jones against a sentence of six months' imprisonment imposed on him at Gloucester Quarter Sessions to which court he had been committed for sentence after he had pleaded guilty at Littledean Magistrates' Court to driving a motor vehicle while disqualified, contrary to s. 110 of the Road Traffic Act, 1960, as amended, the prosecution having applied for summary trial under s. 18 (1) of the Magistrates' Courts Act, 1952. The appellant was also disqualified for 12 months consecutive to existing disqualifications.

V. K. Winstain for the appellant.

G. B. Hutton for the Crown.

EDMUND DAVIES, L.J., delivered the following judgment of the court: This appeal is dismissed. On 26th September 1968, at the Littledean Magistrates'

Court, the appellant, Gwyn Jones, pleaded guilty to driving whilst disqualified, contrary to s. 110 of the Road Traffic Act 1960, as amended, and he was committed under s. 29 of the Magistrates' Courts Act 1952 to Gloucester Sessions. There, on 28th October 1968, he was sentenced by the learned assistant recorder to six months' imprisonment concurrent with a sentence of four months' imprisonment imposed, on 16th October 1968, by the Ross magistrates for an offence of larceny. He was also disqualified for 12 months consecutive to an existing disqualification. He was granted leave to appeal against the six months' sentence by the single judge, who had in mind a decision of this court in *R. v. Moore* (1) as recently as 19th August 1968, when this court was sitting in vacation.

The facts were that, during the evening of 21st June, 1968, the appellant, according to his own statement, was driven around the countryside by a man named Williams in the latter's newly acquired car. Mr. Williams was also disqualified. The car broke down, it was said, some 40 yards from Mr. Williams' house and the police found the two men there at about 1.30 in the morning of June 22. They were asked who the driver was and the appellant said that he had just driven it in reverse for some 40 yards from a garage yard. He might have said that out of loyalty to Mr. Williams. One of the officers knew that Mr. Williams was disqualified, but he knew nothing about the disqualified status of the appellant. He accordingly told the appellant that, if he had driven it that night, he had better drive it back to the garage yard and that the appellant proceeded to do. That was the driving while disqualified which was relied on by the prosecution, the appellant saying nothing to the officer about his own disqualification.

Leave was granted by the single judge on the basis that the prosecution asked for summary trial under s. 18 (1) of the Magistrates' Courts Act 1952. There is no doubt that that is what in fact happened. Section 29 of that Act, under which the justices purported to act, contains no provision for committal for sentence under s. 18 (1) but only under s. 18 (3) and s. 19. The point taken by the learned single judge in granting leave was that driving whilst disqualified is a hybrid offence under s. 110 of the Road Traffic Act 1960, as amended. Accordingly, it appeared to the learned single judge, as it did to this court in *R. v. Moore* (1), that the committal for sentence was a nullity and this court, for what it is worth, now expresses the view that the committal was indeed a nullity.

But this appeal, of course, is against sentence. In *R. v. Moore* (1) to which I have already made reference, the essential facts were similar, namely, at the request of the prosecution a summary trial under s. 18 (1) of offences of driving whilst disqualified. The applicant was there not represented, but the Crown was, and it is the clear recollection of THOMPSON, J., and of myself, we being members of that court, that it was conceded by the Crown not only that the committal was a nullity but that the sentences imposed must be quashed. That is not in any way to pass the responsibility for the decision to learned counsel; it was the decision of the court, and not of counsel for the Crown. Nevertheless, in those circumstances, this court came to the conclusion that the sentences imposed on Moore had to be quashed. We did not have the advantage of having cited to us, as counsel for the Crown has cited today, the decision of the Court of Criminal Appeal in *R. v. Warren* (2) decided in the year 1954. The facts are quite different, but the principle to be applied is entirely apposite to the present appeal. There, LORD GODDARD, C.J., dealing with a man who had been convicted before a metropolitan magistrate of cases of indecent assault, quoted s. 19 of the Magistrates' Courts Act, 1952, and then proceeded in this way:

(1) (1968), *The Times*, August 20.

(2) 118 J.P. 238; [1954] 1 All E.R. 597.

"... our jurisdiction is a purely statutory jurisdiction. I say at once that, if a man desires to take the point that he was wrongly committed for sentence, in my view, the right course for him to take is to apply to the Queen's Bench Division for an order of prohibition directed to quarter sessions to prevent them from proceeding, which he must issue before he is before the sessions, or, possibly, at a later stage, for an order of certiorari, to bring up the order of committal to be quashed."

Then LORD GODDARD quoted s. 29 (3) of the Criminal Justice Act, 1948, and continued:

"In our opinion, it is clear that once the offender comes to this court we cannot consider the validity of the conviction in the court of summary jurisdiction. We can only consider the sentence which has been passed, and if we find that it is a more severe sentence than the court of summary jurisdiction could have passed, we can consider the sentence under the powers given to us by s. 4 of the Criminal Appeal Act, 1907... so we can quash the sentence passed at the trial and pass any other sentence... which we think ought to have been passed."

And finally he said:

"We think we can only go into the question whether or not, if this man had been convicted on indictment, it was a proper sentence. If he had wanted to challenge the magistrate's power to commit him for sentence, it must have been done by another procedure."

That case was followed by the Court of Criminal Appeal in *R. v. Brown* (1). Unhappily, neither *R. v. Warren* (2) nor *R. v. Brown* (1) was cited to this court, nor did we have them in mind when we dealt with *R. v. Moore* (3) otherwise we would have dealt with that case differently.

It has been urged by counsel for the appellant that, nevertheless, we could here proceed to quash the six months' sentence by virtue of s. 10 (3) (b) and/or s. 11 (3) (b) of the Criminal Appeal Act 1968. But this court is quite clear that neither of those sections may be invoked, for they both pre-suppose that there existed in the lower court a power to deal with the accused appearing before them by way of sentence, whereas counsel concedes (and indeed it is the foundation of his submission on the appellant's behalf) that quarter sessions had no power to deal with the appellant at all. Accordingly, though this court is of the view that the committal of the appellant to quarter sessions was, for the reasons stated, a nullity, we are regrettably powerless to allow this appeal and the appellant must be left to take the procedure indicated in *R. v. Warren* (2). He is, as we have already said, serving a sentence of four months, imposed as recently as 16th October 1968 for larceny and no application has been made in relation to that. Were he in custody solely in relation to the driving whilst disqualified charge, this court would have proceeded to consider the matter of bail, but consideration of that does not arise at this stage. For those reasons, this court, having per incuriam acted in *R. v. Moore* (3) as it did, now dismisses this appeal.

Appeal dismissed.

Solicitors: Registrar of Criminal Appeals; Field, Roscoe & Co., agents for Prosecuting Solicitor, Gloucester.

T.R.F.B.

(1) [1963] Crim. L.R. 647.

(2) 118 J.P. 238; [1954] 1 All E.R. 597.

(3) (1968), The Times, August 20.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, J.J.)

November 6, 7, December 11, 1968

HARTLEY v. MINISTER OF HOUSING AND LOCAL GOVERNMENT
AND ANOTHER

Town and Country Planning—Development—Material change of use—Discontinuance of original use—Abandonment—Resumption of original use—Petrol filling station with land attached—Use for dual purpose of filling station and for sale and display of cars—Discontinuance of use for sale and display of cars—Subsequent resumption—Town and Country Planning Act 1962 (10 & 11 Eliz. 2 c. 38), s. 12 (1).

A site consisted of a petrol filling station ("the red land") and an adjoining plot ("the blue land"), the permitted use of which was for agricultural or residential purposes. There was no defined access from the highway to the site. The red land was originally used for the dual purpose of a petrol filling station and for the display and sale of cars. The blue land had been used, at any rate until 1959, for the display of cars for sale. In March, 1961, F. purchased the red land and later in the same year the blue land. He died in 1963, and afterwards his widow and son carried on the business of the petrol filling station, but allowed the display and sale of cars to lapse. In February, 1965, the appellant purchased the whole site from Mrs. F. and thereafter conducted on the red land the business of selling cars as well as the petrol filling station. On March 1, 1967 (within four years of the change of title), an enforcement notice was served by the local planning authority on the appellant, alleging that no planning permission for the use of the land by him for the display and sale of cars had been obtained and requiring immediate discontinuance. The appellant appealed against the notice to the Minister, who found that by 1965 the use of the land for car sales had been abandoned and that the re-introduction of the use of the site for the display and sale of cars in 1965 involved a material change of use amounting to development under s. 12 (1) of the Town and Country Planning Act, 1962. He accordingly dismissed the appeals and from that decision the appellant appealed to the Divisional Court.

HELD: that the appeal must be dismissed as the question whether there had been a change of use was largely a question of fact and degree and so pre-eminently a question for the Minister and there was no error in law in the Minister's approach to the issue.

Per ASHWORTH, J.: If the sole use to which land is put is suspended and thereafter resumed without there having been any intervening different user, *prima facie* the resumption does not constitute development, although there may be cases in which the period of suspension is so long that its original use can properly be described as having been abandoned. If land is put to more than one use, the cessation of one of the uses does not of itself constitute development.

APPEAL by Ronald George Hartley, under s. 180 of the Town and Country Planning Act, 1962, against a decision of the respondent, the Minister of Housing and Local Government, dismissing an appeal by the appellant against an enforcement notice, served on the appellant by the local planning authority, the Cumberland County Council, in respect of land attached to and adjoining a petrol filling station near Cockermouth, Cumberland. The enforcement notice alleged that no planning permission had been obtained for the use of the land for the display and sale of cars and required immediate discontinuance.

I. D. L. Glidewell for the appellant.

M. H. Spence for the Minister of Housing and Local Government.

The Cumberland County Council did not appear.

Cur. adv. vult.

December 11, 1968. WILLIS, J., read the following judgment: This is an appeal, under s. 180 of the Town and Country Planning Act, 1962, from

a decision of the Minister of Housing and Local Government dismissing an appeal against an enforcement notice, served on the appellant by the Cumberland County Council, in respect of 0.4 acres of land, attached to and adjoining the Bridgefoot Petrol Filling Station, near Cockermouth. Only the Minister responds to the appeal. The enforcement notice, dated March 1, 1967, described the alleged development as the use of land for the sale and parking of motor vehicles, and required the discontinuance of that use, the removal of all motor vehicles other than those normally using the petrol filling station and (by reference to an annexed plan) the restoration of the "red" land to use as a petrol filling station and of the "blue" land to its former agricultural or residential use. It is agreed that the greater part of this "blue" land is being developed for a bungalow and has never been used in any other way than for agricultural or residential purposes. References hereinafter to the "blue land" are to that part of it described as "sunk" and immediately adjoining the filling station. The appellant having appealed against the enforcement notice, the Minister directed a public inquiry to be held by one of his inspectors on 6th September 1967. From the inspector's report it will be helpful to extract first the salient facts as to the site itself.

The land lies in agricultural countryside outside the village of Bridgefoot equidistant between Cockermouth and Workington. The filling station (or "red land") has a frontage of 154 feet and a depth varying from 38 feet to 60 feet, a concrete surface, a small single-storey brick building at the back of the site for housing a compressor and oil, while in the centre stands a group of three petrol pumps and a wooden kiosk for the attendant. There are no defined accesses from the highway. The relevant or sunk part of the "blue land" with a frontage of 20 feet and a depth of 64 feet is adjacent to the "red land" and appears to have been lowered at some time to the level of the adjoining filling station surface. At the time of his visit the inspector found 18 cars for sale, some with price tickets, 15 of which were standing at the back of the site (red and part blue) and three on the red site near the south west boundary.

The history of this site so far as material was set out as follows in the inspector's findings of fact: (a) the appellant bought the site in February 1965 and has since been conducting on the red and sunk blue part thereof the business of selling petrol and oil, and cars; (b) since February 1965 car sales have been advertised and 350 cars have been sold from the site; (c) between 1959 and 1st March 1961 about 14 cars were sold from the red land; (d) two cars and one lorry were sold from the red land between March 1961 and February 1965. The inspector then went on to record what he described as "claims" made in the evidence as set out below, but he refrained from making any specific finding as to any of them. They form a somewhat nebulous background to such use as was made of the land for car sales and display prior to its acquisition by Mr. Fisher in 1961.

1. *Petrol Filling Station*—Summarised, there were recorded sales of cars pre-war, continued in 1946, always one or two cars on the site between 1949 and 1954, and the sale of three cars and a motor cycle combination about 1959.

2. *Land Coloured Red*—Never less than two nor more than four cars displayed up to 1959. Not less than four nor more than six displayed between 1951 and 1956. One or two cars lined up between 1955 and 1956. Always one or two and sometimes up to four cars displayed between 1959 and 1961.

3. *Land Coloured Blue*—Five cars seen displayed at the south west end 1952, seven cars seen displayed sometime before 1959. Two cars placed thereon for two or three weeks sometime between March 1961 and February 1965.

The inspector's conclusions were that such sale of cars from the red land as there might have been was no more than incidental to the petrol filling use; that there was no real evidence of sale of cars from the blue land prior to the appellant's occupation in 1965, and the substantial increase in car sales from the red land, and the selling of cars from the blue land after February 1965 constituted development for which planning permission was required. The Minister in his decision took the view that the sale of cars was not incidental to the petrol station use and the first question to which he addressed himself was whether the independent use for car sales was sufficient to amount to a material change of the use prior to 1st March 1963. Before referring to the Minister's conclusions it is necessary to quote from his letter as to the use of the land between 1951 and February 1965.

"In March 1961 Mr. Fisher bought the petrol station, and later in the year . . . the blue land. After six months he became ill and died in September 1963 and his widow and her son then aged 19, carried on the petrol station. Mrs. Fisher stated . . . that she would not let her son sell cars as he was inexperienced and she had another business; despite this one lorry and two cars were . . . sold . . . she made no use of the blue land except that [her and her son's cars] had been parked there for two or three weeks."

The Minister's letter goes on to:

"It is considered on the evidence that up to the time of Mr. Fisher's purchase of the petrol filling station in 1961 there was a dual use of the red land as a petrol filling station and for the display and sale of cars. It is also accepted that cars were to a lesser extent displayed for sale on the low-lying part of the blue land up to at least 1959 . . . With regard to the period from 1961 to February 1965, however, the only evidence of car sales from the whole site was that one lorry and two cars were sold from the red land and Mrs. Fisher stated that she would not allow her son to sell cars. It is considered that during this period (March 1961–February 1965) the use for car sales had ceased, the intention being to cease it indefinitely. By 1965, if not in 1961, the use for car sales had been abandoned, and the use of the site was that of a petrol filling station only. The reintroduction of the additional use of the site for the display and sale of cars in 1965 involved a material change of use amounting to development, which took place within the relevant four year period and your client's appeal must therefore fail . . ."

The evidence divided conveniently into three phases and the Minister has dealt with it likewise in his findings. (a) In phase 1, that is up to March 1961, a dual use of the red land as a petrol filling station and for the display and sale of cars; on the blue land at least up to 1959 a use for the display of cars for sale. (b) In phase 2, March 1961 to February 1965, over the site as a whole, that is red and blue, the use for car display and sales had ceased and had been abandoned by 1965, if not by 1961, so that by 1965 the site was used only for the single purpose of a petrol filling station. (c) Phase 3 starts with the occupation by the appellant in February 1965 and the resumption of the use for car display and sales, together with a continued petrol filling station use, that is the phase 1 dual purpose.

The real issue is the not uncommon one in such cases as this, namely whether the use to which the site was put by the appellant, of which complaint is made, is materially different from a former use so as to amount to development under s. 12 of the Act of 1962, and, if so, whether the change has occurred within four years prior to the date of the enforcement notice. It being common ground that the dual purpose in phase 1 was the same dual purpose as that in phase 3,

the particular question in this case can be stated simply to be this—what was the true effect in law and fact of the cessation of one of the two uses during phase 2, and its resumption at the start of phase 3?

As this court has laid down on a number of occasions, whether there has been a material change of use in any particular case is largely a question of fact and degree and so is a question pre-eminently for the Minister. Nevertheless difficult questions do arise from time to time when the effect for planning purposes of the suspension (to use a neutral word) of a use and its subsequent resumption fall to be considered. Even, however, where that variant is introduced into the enforcement problem, or, as in this case, the question of composite uses arises the basic question remains the same. Adopting the words of WIDGERY, J., in *Wipperman and Buckingham v. London Borough of Barking* (1):

“The question for the Minister . . . was whether, when one looked at the use of the land . . . [before 1965] and compared it with the use of the land immediately following the occupier's entry, there had occurred a material change of use . . .”

If, therefore, it is to be concluded that the Minister has asked himself the right question and there was evidence on which, as a matter of fact and degree, he could come to the conclusion that the appellant's use of the site did constitute a material change there could be no question of this court interfering with his decision. However, counsel for the appellant (to whom and to counsel for the Minister the court is indebted for their arguments) submits, first, that the Minister has reached his findings as to the single use in phase 2 by applying a concept unknown to the law, namely by equating the cessation of the car sales use with the abandonment of that use, thus leaving by subtraction, as it were, the single filling station use. He concedes that there can be a material change from the dual to single use, but only, he submits, if: (a) the single use absorbs the whole of the site; and (b) there is an intention to use the site in that way. Alternatively, he submits that there was no or no sufficient evidence on which the Minister was justified in finding that there had been an abandonment of the car sales use.

Speaking for myself I do not think that the word “abandonment” connotes anything essentially different in this legislation from the word “discontinuance”, which finds a place in it (see for example s. 51 (1) and (2)) or “cessation”. “Discontinuance” of a use does not necessarily involve a permanent state, see per DONOVAN, J., in *Postill v. East Riding County Council* (2); nor in my judgment do the words “cessation” or “cesser” or “abandonment”. Further, the concept of a use of land being abandoned or discontinued, so that the resumption of that use at a later date is capable of constituting a material change of use is fully supported by dicta, albeit obiter: see per LORD DENNING, M.R., in *Webber v. Minister of Housing and Local Government* (3) and per WIDGERY, J., in the *Wipperman* case (1). Were abandonment of an established use not in law possible, the issue in *Fyson v. Buckinghamshire County Council* (4) as counsel for the Minister submits, could hardly have arisen. So far, therefore, as the first limb of counsel for the appellant's argument involves the submission that the cessation of a use cannot in law amount to its abandonment or that a use of land, once established, cannot be abandoned, I would reject it.

For the second part of his submission, namely that a change from a dual to a single use can only occur as a matter of law if there is shown to have taken

(1) (1965), 130 J.P. 103.

(2) 120 J.P. 376; [1956] 2 All E.R. 685; [1956] 2 Q.B. 386.

(3) [1967] 3 All E.R. 981.

(4) 122 J.P. 333; [1958] 2 All E.R. 286.

place over the site as a whole an absorption of one of the components by the other and an intention to bring this about, counsel for the appellant relies on the *Wipperman* case (1). In that case WIDGERY, J., said:

"Merely to cease one of the component activities in a composite use of land would not, by itself, ever amount to a material change of use. But what has happened here is not merely a cessation of the car breaking activity but the use of the land as a whole for storage. In my judgment, as a matter of law, there can be a material change of use if one component is allowed to absorb the entire site to the exclusion of the other, and whether or not there is a material change is a matter of fact and degree."

It is to be noted that WIDGERY, J. says "can be" not "can only be" and his reference to cessation is in the context of a hypothetical cessation of one use by the existing occupiers.

Counsel for the appellant submits that before the Minister can find that a change from the single (phase 2) purpose to the dual (phase 3) purpose is material, he must also find that the change from the dual (phase 1) to the single (phase 2) purpose is a material change. He says that all that the Minister has found is that one of the two component uses ceased during phase 2 and since cessation of itself cannot constitute a material change from dual to single use, the dual use remains dormant and capable of being awakened as it was by the appellant in 1965 without involving development. He says that there is no distinction in principle between such a case and the example given obiter by LORD PARKER, C.J., in *McKellan v. Minister of Housing and Local Government* (2), since in the present case one of the component uses remains constant throughout all three phases. *McKellan's* case was, of course, concerned with a single use. This would be a formidable argument as it seems to me, if it could be framed within the facts of such a case as *Fyson* (3). But the fallacy, I think, is that this is not a case of an intervening nil use, but of a continuing use of one of two component uses. In such a case the land continues in use and whatever that use is must be contrasted with the use sought to be enforced in order to answer the question whether a material change has occurred.

In my judgment, therefore, while the questions of the absorption of one component use by another, the intention of the occupier, and the period during which a particular use may have been in abeyance are, where they arise, all proper matters for the Minister's consideration, they should be taken into account together with other relevant considerations as matters of fact and degree in deciding the all-important question of material change. In the present case I can find no error in law in the Minister's approach, and the conclusion that prior to 1965 the use of the whole site was for a filling station only, is a finding of fact which must be accepted, if there was evidence justifying it. Counsel for the appellant said that there was no such evidence. I confess at one stage I thought he was right. If, for example, Mrs. Fisher had found herself at any time up to 1965 able to resume car sales which circumstances had compelled her to discontinue during the previous four years, would that resumption have been a material change of use? If she could resume, why not her successors? This however, is a hypothetical case, and if it ever arose in fact would have to be considered as a question of fact and degree.

Although Mrs. Fisher stated that her husband's death had spoilt the plans for the site, and that she would have liked to continue the car sales use but for

(1) (1965), 130 J.P. 103.

(2) (6th May 1966), unreported.

(3) 122 J.P. 333; [1958] 2 All E.R. 286.

her own business preoccupation and the inexperience of her son, the Minister, while taking this into account as he did, had to contrast the pre- and post-1965 use of the land as disclosed by the evidence. Looked at in this way it seems to me that there was ample evidence to justify his conclusion that the car sales use had been abandoned or discontinued, or had ceased. In other words I think he was saying that, as a matter of fact and degree, it could no longer be said that the site was being used for the two purposes which comprised its former use. By contrast he then considered the post-1965 use of the land when 350 vehicles had been sold and 18 were on display at the inspector's visit. On that evidence it seems to me impossible to say that he was not justified in finding that the resumption of the use for car sales involved a material change of use and for my part I would dismiss the appeal.

ASHWORTH, J., read the following judgment: This appeal is another example of the legal difficulties which may arise when a particular use of land is discontinued and thereafter resumed. Does such resumption constitute development for the purposes of the Town and Country Planning Acts? As it seems to me, the following propositions can be derived from the various reported cases to which reference was made during the hearing:

1. If the sole use to which land is put is suspended and thereafter resumed without there having been any intervening different user, *prima facie* the resumption does not constitute development. As LORD PARKER, C.J., said in *McKellan v. Minister of Housing and Local Government* (1):

"It is of course quite plain that a change from A to X and then from X to A does not involve development, either way, if X is completely nil, no use at all."

2. There may be cases in which the period of suspension is so long that the original use can properly be described as having been abandoned. In *Webber v. Minister of Housing and Local Government* (2), LORD DENNING, M.R., said:

"I would only add that if the normal use is abandoned for a time, a resumption of it afterwards would need planning permission."

In *Hawes v. Thornton Cleveleys Urban District Council* WIDGERY, J., said (3):

"It may very well be that, if a use is discontinued and abandoned . . . the proper view is that the first use has gone and that a resumption of similar activities at a later date would amount to development and require permission."

3. If land is put to more than one use, usually referred to as a composite use, the cessation of one of the uses does not of itself constitute development. See *Wipperman and Buckingham v. London Borough of Barking* (4).

4. If one of two or more composite uses is discontinued and thereafter resumed, the question whether such resumption constitutes development is a question of fact to be determined in the light of all the relevant circumstances. Much will depend on the nature of the uses, what portion of the site was devoted to the discontinued use, what use (if any) was made of that portion during the period of discontinuance, how long the discontinuance lasted and so on. I make no attempt to set out an exhaustive list of the factors which would have to be considered, since each case must be decided on its own particular facts.

(1) (6th May 1966), unreported.

(2) [1967] 3 All E.R. 981.

(3) (1965), 63 L.G.R. 213.

(4) (1965), 130 J.P. 103.



Ultimately the problem will resolve itself into the question "When the resumption occurred, was there a material change in the use of the land?"

In the present case, the question whether development occurred when the appellant took over the site in 1965 and resumed the sale of cars was not by any means easy to answer. There is much to be said for counsel for the appellant's contention that the second phase, between 1961 and 1965, was a period when the use of the site for the sale of cars was so to speak lying fallow, and that but for Mr. Fisher's unfortunate illness and death this use would not have been discontinued at all. Moreover there is virtually no evidence that the portion of the site previously used for car sales was absorbed into that portion used for the filling station. On the other hand I cannot reach the conclusion that there was no evidence to justify the Minister's decision to the effect that the use of the site for car sales was for all practical purposes non-existent between 1961 and 1965 and could properly be regarded as abandoned. Nor can I find any justification for holding that the Minister mis-directed himself in law. In these circumstances, in my judgment, this appeal should be dismissed.

LORD PARKER, C.J.: I agree with both judgments.

Appeal dismissed.

Solicitors: Barlow, Lyde & Gilbert, for Milburn & Co., Workington;
Solicitor, Ministry of Housing and Local Government.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

November 7, 8, 1968

R. v. BRIXTON PRISON GOVERNOR. Ex parte RUSH

Extradition—Fugitive offender—Charge of conspiracy in Canada to defraud public—Inducement to United States residents to purchase shares in company—False description of assets—"Relevant offence"—Whether offence triable under English law in corresponding circumstances—Fugitive Offenders Act 1967 (c. 68), s. 3 (1).

At the request of the Canadian government the applicant was arrested in the United Kingdom and an order under the Fugitive Offenders Act, 1967, was made for his detention pending his extradition to Canada. The order related to eight charges, number 1 of which charged conspiracy to defraud the public of \$100,000,000 by inducing persons, through the use of the mails and telephone services, to purchase shares of two companies which did not have the attributes ascribed to them by the defendants or their agents. The evidence disclosed that the descriptions of the assets were completely false. Contact had been made by mail and telephone from Canada with persons resident in the United States, who were invited to purchase the shares and send their cheques to addresses either in Panama or Nassau, but some of the cheques were sent back to Canada. On the question whether extradition of the appellant should be ordered in respect of charge number 1,

HELD: (i) the charge disclosed a "relevant offence" within the meaning of s. 3 (1) of the Act of 1967, because it disclosed both an offence under Canadian law and an offence which would have been an offence under the law of England if the conspiracy had been made in corresponding circumstances; but (ii) the indictable offence was the inducing of residents in the United States to buy shares, and that as the cheques were obtained from them either when they were posted in the United States, or, at the latest, when they were received either in Panama or Nassau, the offence was complete at that point; (iii) accordingly, as the only acts which took place in Canada were the printing of the circulars, the typing and posting

of the letters, the making of phone calls and the ultimate collection of the cheques, there was not sufficient evidence to warrant, in corresponding circumstances, the trial of the offence under English law, on the general principle that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie here; accordingly, the applicant would not be returned to Canada in respect of charge number 1.

MOTION on behalf of Michael Myer Rush, who was detained in H.M. Prison, Brixton, for a writ of habeas corpus directed to the governor of Brixton Prison and the representative of the Canadian government in London to bring the applicant before the Divisional Court of the Queen's Bench Division and quash an order made by a metropolitan stipendiary magistrate under the Fugitive Offenders Act, 1967, that the applicant be extradited from the United Kingdom to the Dominion of Canada to face charges including one of conspiracy to defraud.

Sir Peter Rawlinson, Q.C., and *J. M. Cope* for the applicant.

J. H. Buzzard and *C. P. C. Whelon* for the governor of Brixton Prison.

C. J. S. French, Q.C., and *M. H. D. Neligan* for the Canadian government.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the applicant, one Michael Myer Rush, at present detained in Her Majesty's Brixton Prison pursuant to an order of the metropolitan magistrate sitting at Bow Street pending his extradition to Canada under the Fugitive Offenders Act 1967.

The history of this matter is that the applicant was arrested on 21st June 1968 on a provisional warrant issued at Bow Street at the request of the Canadian government. On 22nd August, an order to proceed was issued under s. 5 of the Act by the Secretary of State for Home Affairs requesting the magistrate to proceed with the case in accordance with the provisions of the Fugitive Offenders Act 1967 in respect of some eight charges set out in the schedule to the order to proceed. The order in question subsequently made, as I have said, was made on 6th September and related to each of those eight charges.

Before considering the matter in any further detail, I think it is as well to remind oneself of a few of the provisions of the Fugitive Offenders Act 1967. Before a fugitive offender can be extradited it must be shown that the offence or offences to which the order to proceed relates are what are called in this Act "relevant offences". By s. 3 (1) it is provided that:

"For the purposes of this Act an offence of which a person is accused or has been convicted in a designated Commonwealth country . . . [and Canada is one] is a relevant offence if—

(a) in the case of an offence against the law of a designated Commonwealth country, it is an offence which, however described in that law, falls within any of the descriptions set out in Schedule 1 to this Act, and is punishable under that law with imprisonment for a term of twelve months or any greater punishment; . . ."

As will be shown in a moment, nothing turns on that because there was before the magistrate an affidavit from a Canadian lawyer verifying that each of these eight charges fell within s. 3 (1) (a) of the Act. But then by para. (c) it is provided that to be a relevant offence:

"in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom or, in the case of an extra-territorial offence, in corresponding circumstances outside the United Kingdom."

Provision is then made in s. 4 restricting the power to return in the case of political offences or offences of a political character and then by s. 4 (3) it is provided that:

"A person shall not be returned under this Act to any country, or committed to or kept in custody for the purposes of such return, unless provision is made by the law of that country, or by an arrangement made with that country, for securing that he will not, unless he has first been restored or had an opportunity of returning to the United Kingdom, be dealt with in that country for or in respect of any offence committed before his return under this Act other than—

(a) the offence in respect of which his return under the Act is requested; . . ."

I read that because it is important to remember that the court in this case and under this Act, unlike the earlier Act, must deal with each of these charges in the order to proceed and that the applicant can only be sent out of this country for trial in respect of those offences which the courts in this country are satisfied fall to be tried under this Act. Section 7 sets out the proceedings before the magistrate after the order to proceed has been issued to him and by sub-s. (5), which is the important provision in this case, it is provided that:

"Where an authority to proceed has been issued in respect of the person arrested and the court of committal is satisfied, after hearing any evidence tendered in support of the request for the return of that person or on behalf of that person, that the offence to which the authority relates is a relevant offence and is further satisfied—

(a) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it has been committed within the jurisdiction of the court; . . ."

The charges in the schedule to the order to proceed were, as I have said, eight in number and for my part I find it convenient to look first at charges 7 and 8, not only because they were earlier in point of time but also because in some respects they are the simplest to deal with. Charge 8 is one of conspiracy. [His LORDSHIP stated the nature of that charge and that of charge 7 which charged an overt act pursuant to the conspiracy. He continued:] There is no doubt that those two offences as laid comply fully with s. 3 (1) (a) of the Act; they were both offences under Canadian law. They also quite clearly come within s. 3 (1) (c) in that in each case the act (or acts) constituting the offence would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom. Indeed no one has sought to argue to the contrary. The sole question here is whether there was under s. 7 (5) (a) sufficient evidence to warrant the applicant's trial for that offence.

[His LORDSHIP then reviewed the evidence relating to charge 7 and charge 8, and concluded:] The magistrate was quite in order in committing the applicant to prison with a view to his extradition for trial on those two charges.

The facts relating to the other charges, 1 to 6 inclusive, are rather more complicated and before reading the charges in detail I will try to give a short résumé of what the evidence, it was said, disclosed. It disclosed the connection between the applicant and a Mr. Joseph Williams of Queen's Counsel, sometimes apparently known as "Diamond Joe". Mr. Williams was interested in mining companies and mining shares and at one time controlled a company called Aurora Development Corp., Ltd., which purported to sell to a company called Darien Exploration Co. (Darien for short) various mining concessions in Guyana. In addition, Mr. Williams was at all material times the legal adviser of a company called British Overseas Mutual Fund Corp. (conveniently, perhaps, called

British Overseas) and that company, it was said, had been taken over by the applicant in June 1965; and at any rate some time in 1966 the applicant not only managed the company but had all the shares in the company. Darien, which, as I have said, purported to have mining concessions in Guyana, had been formed by the applicant in 1963 and was at all times controlled by him. There was evidence of a scheme to get shareholders of inactive mining companies to transfer their shares to Darien in exchange for Darien shares and, when that had been done, to persuade those who had become shareholders in Darien to purchase further shares in Darien and also in British Overseas, and to that end circulars and letters were prepared in Canada to be sent to shareholders of these inactive companies who had become shareholders in Darien or British Overseas. What part exactly the applicant was said to have played is uncertain. It was at any rate an important part and he, as a security salesman, had a list of persons to whom circulars and letters would be sent. The evidence also showed that in every case the circulars and letters were sent outside Canada, and in particular to the United States of America. Sometimes they were sent directly to the addressees from Canada, sometimes they were taken out of Canada and then sent to the addressees and yet again in other cases they were sent to a Mr. Green in Guyana who in turn would send them to the addressees. It was said that in the circulars and letters attributes were given to Darien and British Overseas which were not only entirely false but fraudulent. As a result, a number of people agreed to buy more Darien shares or to buy British Overseas shares and, when they so agreed, confirmation slips were sent showing the payment due and, in each case, the prospective purchaser was invited to send his cheque to the appropriate Post Office box of the Darien Exploration Co., either in Nassau or in Panama. Those that were sent to Panama were then transferred by Panama lawyers to Toronto and those sent to Nassau were received by a Mr. Britstone, another of the alleged conspirators.

Before dealing with what happened to the cheques thereafter I should say that not only were the circulars and letters sent but follow-ups, as it were, were made by telephone calls from Canada to the places where the addressees or respective purchasers lived. As regards the cheques, those that were sent to Nassau, some were paid by Mr. Britstone into his own account with a bank in Nassau, and others he transmitted to Toronto where they were paid either into an account in the name of M. O'Quinn, who was in fact Mrs. Britstone, or into the account of British Overseas in Toronto, which was an account solely operated by the applicant. As I have said, all or almost all the addressees and the persons who bought shares were resident in the United States. The only possible exceptions were two Canadian residents in respect of whom two cards were found entitled "Exchange Agreement", showing the number of shares in a company, presumably one of the inactive companies, called Medallion to be transferred to Darien for an exchange in Darien shares. Those two cards were found by a Mr. Huxley, the investigator of the Ontario Securities Commission, when he began his investigations and there is no evidence, as I understand it, that in fact any letters were sent to these two persons, these Canadian residents, or that they were invited to take up shares or that they agreed to take up shares. The fact is that there were found in the records two cards which had never gone out to the Canadian residents but bore their names.

Those are the short facts and, bearing in mind that the evidence shows that there were no mining concessions in Guyana, that all the descriptions of the assets were completely and utterly false, there is clearly evidence of a gigantic conspiracy of some kind or another. Having said that, one returns to the charges and charge no. 1, the really important one in this case, reads in this way:

"That Michael Myer Rush, Robert Colucci, and Joseph S. Williams, at the Municipality of Metropolitan Toronto, in the County of York and elsewhere in the Province of Ontario between the first day of June, 1966, and the first day of July, 1967, unlawfully did conspire together and with Manuel Britstone and with other persons unknown to commit an indictable offence, to wit: to defraud the public of one hundred million dollars (\$100,000,000.00) more or less, by inducing [and a number of persons are there set out] and other members of the public, through the use of the mails and telephone services, to purchase shares of Darien Exploration Company, S.A., and British Overseas Mutual Fund Corporation, which shares did not have the attributes ascribed to them by the accused or their agents . . ."

Pausing there, the first question that the magistrate and now this court must ask itself is whether that charge there discloses a relevant offence. In my judgment it does, because on the face of it those that were to be defrauded by the alleged conspiracy were, for all anyone knew, members of the Canadian public and if members of the Canadian public it is perfectly clear that not only did it disclose an offence under Canadian law but it discloses an offence under the law of England if the conspiracy had been made in, for instance, London in respect of what is referred to in s. 3 (1) (c) as "corresponding circumstances". Accordingly, as it seems to me, one then has to go on and see whether the evidence disclosed was sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the court. When one looks at the evidence it is perfectly clear, as I have said, that except in respect of these two cards which name Canadian residents and which in fact were never sent out, all the members of the public that were approached were resident in the United States of America. It was in fact United States residents who were induced by, it is said, false pretences to enter into contracts for the purchase of shares and pay for those shares and the real question here, as it seems to me, is whether when that stage is reached there was disclosed here an offence for which he could have been tried in England if this had occurred in England in relation to a foreign country.

The approach on this has now been laid down by the House of Lords in *Board of Trade v. Owen* (1), and it is quite clear now that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie here. The sole question then is whether on the facts disclosed, substituting England for Canada (in other words, the conspiracy taking place in England and not in Canada) an offence against English law was disclosed, which in turn means whether an indictment would lie in this country for the substantive offence. As has already been disclosed in the course of the narrative of the facts, apart from the conspiracy itself the only acts which did take place in Canada were the printing of the circulars, the typing of the letters, in some cases their posting, the telephone calls in the nature of follow-ups and the fact that both Mr. Britstone and the applicant eventually got the cheques collected mostly in Canada and were credited, no doubt, with the proceeds. In my judgment it is really impossible to say that an offence of that kind could have been indicted in this country. In *Board of Trade v. Owen* (1) some of the overt acts were acts which took place in England; the forged documents emanated from England; and the documents were sent from England to, in that case, Germany. It was urged that if a letter sent out of this country had been intercepted it would be very odd that there could be an indictment for an attempt and yet if the whole fraud had gone through there could not be an indictment for the fraud. All matters of that sort were fully argued in *Board of Trade v. Owen* (1) but nevertheless it was held that no indictment would lie for

(1) 121 J.P. 177; [1957] 1 All E.R. 411; [1957] A.C. 602.

the substantive offence and that accordingly the charge of conspiracy in that case could not be sustained.

That case was followed by the Court of Appeal in the case of *R. v. Cox* (1). That was a case in which the conspiracy alleged was to defraud persons by inducing them to part with goods by false pretences and the conspirators there acquired in England a chequebook containing unused cheques. They took those cheques out of the country and by means of five cheques they persuaded French shopkeepers to part with jewellery by falsely representing that they had accounts with the bank on which the cheques were drawn and having got their jewellery they brought it back to England and sold it in Essex. The Court of Appeal, following *Board of Trade v. Owen* (2), held the alleged conspiracy was not indictable in England.

For my part, I find it really impossible to distinguish this case from those and earlier cases. Counsel for the Canadian government has taken a number of points by which he seeks to distinguish this case from those cases. He refers to the overt acts at the beginning, in preparing the letters and circulars, overt acts, as I have said, of a similar kind to those present in *Board of Trade v. Owen* (2). He also refers to the rather remarkable situation that if this investigation had come down before anything had been done, it may be that an indictment would lie for an attempt. That again was something which was urged in *Board of Trade v. Owen*. Then he says that not only at the beginning but at the end something took place in Canada, namely, obtaining money by getting the banks to collect the cheques, and he says in fact that when one looks at this charge it is laid as a defrauding of the public of \$100,000,000. For my part, I am by no means clear that this charge is one relating to money in the sense of cash. It is, according to the Canadian lawyer, a good charge in Canada; that under Canadian law it is an offence to conspire to commit an indictable offence and by s. 323 (1) of the Criminal Code of Canada, as amended:

"Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security is guilty of an indictable offence . . ."

Counsel for the Canadian government urges that this was a defrauding of the public by obtaining money and that that money was only obtained in Toronto when these cheques were cashed. For my part, I am quite unable to accept that view of the matter. When one looks at the evidence here, it is perfectly clear that what these United States residents were being asked to give was the purchase price of the shares by means of cheques, and that really this charge can only be read in line with the evidence if one reads the indictable offence, which they conspired to commit, as one to defraud the public of valuable securities to the value of \$100,000,000. It seems to me that the reality of the situation here, as I have said, is that these United States residents were being induced by false pretences, if they were false, to buy more shares and to pay in valuable securities; and those valuable securities were obtained from them either when they were put into the post or, at latest, when they were received either in Panama or in Nassau. The indictable offence was then ended. That is the indictable offence which was the subject of the conspiracy. What was done with those cheques thereafter is, as it seems to me, neither here nor there. A similar submission was made by counsel for the Canadian government by saying that if it was not money they expected to receive in Toronto when the cheques

(1) 132 J.P. 162; [1968] 1 All E.R. 410.

(2) 121 J.P. 177; [1957] 1 All E.R. 411; [1957] A.C. 602.

were cashed, at any rate it was an obtaining of credit in Toronto. For exactly the same reason, it seems to me that that submission fails. The indictable offence which they conspired to commit was completed when the cheques were obtained.

Then counsel for the Canadian government relies on these two cards in the names of two Canadian residents. For my part, I think it is sufficient to say that I am quite unable to accept such inferences or deductions as one could make from the discovery of those two cards, which in fact were never used, as constituting any evidence, certainly no sufficient evidence, to warrant a trial on this conspiracy charge. I should say that great reliance was placed by counsel for the Canadian government (I should perhaps have mentioned this earlier) on *R. v. Holmes* (1). The headnote reads:

"H. wrote and posted in [Nottingham] a letter, addressed to G. at a place out of England, containing a false pretence by means of which he fraudulently induced G. to transmit to [Nottingham] a draft . . . which he there cashed:—*Held* by the Court there that there was jurisdiction to try H. at [Nottingham], and that the pretence was made at [Nottingham], where also the money obtained by means of it was received."

Since *R. v. Holmes* there have been many cases, of which the most recent one is *R. v. Harden* (2), which, following an earlier case of *R. v. Ellis* (3), has laid down that the question is not where the inducement took place but where the money, property, valuable security or whatever it may be was obtained; in other words, it is the obtaining which is the gist of the offence. In fact in *R. v. Holmes* the money was obtained in England in that it was never obtained until the post arrived and it was delivered, but the point that was never taken in *R. v. Holmes* was the distinction, if any, between money (because this was a charge of obtaining money) as opposed to the draft which was in fact sent. No point was taken on that and I venture to think that, if the point had been taken, the charge of obtaining money was bad whereas if laid as a charge of obtaining valuable security it was correct. Accordingly I can get no help towards the solution of the present case from *R. v. Holmes* (1). Looked at in that light, I have reluctantly come to the conclusion that the applicant should not be returned to Canada for trial on the first count.

[His LORDSHIP then referred to the other counts, 2 to 6 inclusive, which were all of a similar nature and related to the fact that in Canada the applicant was found in possession of a number of the cheques which had been obtained, as it was alleged, by fraud; which were undoubtedly offences both under Canadian and English law. His LORDSHIP concluded:] Accordingly I have come to the conclusion that the order for the applicant's extradition should be supported on charges no. 2 to no. 8 inclusive but he should not be returned for trial on the first charge.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Orders accordingly.

Solicitors: *Official Solicitor; Treasury Solicitor; Charles Russell & Co.*

T.R.F.B.

(1) 47 J.P.Jo. 756; 12 Q.B.D. 23.

(2) 126 J.P. 130; [1962] 1 All E.R. 286; [1963] 1 Q.B. 8.

(3) 62 J.P. 838; [1899] 1 Q.B. 230.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 3, 1968

R. v. O'KEEFE

Criminal Law—Sentence—Suspended sentence—Other alternatives to be first eliminated—Not a substitute for probation order.

Before deciding to pass a suspended sentence, a court should consider and eliminate other possible alternatives. Only when the court has decided that the offender merits a prison sentence should the option of a suspended or a custodial sentence be considered. In particular, a suspended sentence should not be passed when the proper course is to make a probation order.

APPEAL against sentence by Charles Alexander O'Keefe who had been sentenced on May 27, 1968, at South East London Sessions for a number of offences to a total of 12 months' imprisonment, suspended for three years, and on May 28 at Inner London Sessions to a total of 18 months' imprisonment.

M. Carlisle for the appellant.

The Crown did not appear.

LORD PARKER, C.J., delivered the judgment of the court: On 1st May 1968, at a magistrates' court, the appellant pleaded guilty to two charges of receiving, and also a charge of using a motor vehicle without there being in force a policy of insurance, and for driving whilst disqualified. He was committed for sentence to Inner London Sessions, where on 28th May he was sentenced on each of the receiving charges to 12 months' imprisonment, on the third count to one day's imprisonment, and on the last, driving whilst disqualified, to six months' imprisonment consecutive, and disqualified from driving for two years. In other words, he was sentenced to a total of 18 months' imprisonment, and it is against that sentence that he now appeals by leave of the single judge.

The facts matter little. The receiving charges involved a motor car which had been stolen, and was found in the possession of the appellant the next day with false number plates and a road fund licence which corresponded with the number plates. That road fund licence had also been stolen. The appellant was arrested after he was seen to have started to drive it away. He was in fact disqualified, and there was no policy of insurance.

He is 25, with a lamentable record. In 1957 he was conditionally discharged for larceny; in 1958 for larceny he was sent to an approved school; in 1961 and 1962 he was fined; then in 1964 for conspiracy to rob, and assault with intent to rob, he was sentenced to two years' imprisonment. In 1967, for receiving, six months' imprisonment, and then in April 1968, for malicious damage, he was conditionally discharged for three years.

Pausing there for the moment, it would seem that there was nothing wrong in principle in this sentence at all. What has given rise to the grant of leave here is something which I have not mentioned as yet, namely something which happened the day before he was sentenced to the 18 months' imprisonment. It was the day before, on 27th May, that he came before South East London Sessions for possessing housebreaking implements by night, driving whilst disqualified, driving a vehicle knowing it to have been stolen, and driving away without the consent of the owner, and receiving a driving licence. He then received, for that, sentences amounting to 12 months' imprisonment, but—and this is the point—the period of imprisonment was suspended for three years.

That was the day before, and when he came the next day before Inner London Sessions, it was, of course, very naturally urged that he should be dealt with as South East London Sessions had dealt with the case, namely by giving a suspended sentence, or in some other lenient way. The deputy chairman, however, said:

"I am afraid I cannot overlook it. I cannot take the same course which the learned Deputy Chairman took at Croydon. There will be a sentence of 12 months."

The court has come to the conclusion here that the deputy chairman at Inner London Sessions was quite right in the course he took. South East London Sessions were dealing with the offences for which he had been brought up before them. It is true that they knew that the appellant was going to be brought up before Inner London Sessions the next day on other charges, and that those other charges had been committed while he was on bail for the offences being dealt with at South East London Sessions. But they were, of course, only dealing with him for the charges for which the appellant had been brought before them. On the other hand, Inner London Sessions could fully take into account the fresh offences before them, and the fact that they had been committed while the appellant was on bail. The matter does not rest there, because this court has come to the conclusion that the sentences given to this appellant at South East London Sessions were wrong in principle. Those sessions were wrong in passing a suspended sentence. What happened, as the court understands it, is that there was a plea by Mr. Hulford, the probation officer, who had established a successful relationship with the appellant, that he should not be sent to prison. He was supported by a medical report from a Dr. Murphy, the prison doctor at Wandsworth, who said that he ought to attend the Maudsley Hospital, at any rate for investigation. The evidence was that the appellant had an immature, aggressive psychopathic personality, that he drank to excess and that he took drugs. In that condition he was undoubtedly aggressive, and indeed was described as going into uncontrollable rages.

This court is quite clearly of opinion that in those circumstances, the proper course, if South East London Sessions were going to accede to Mr. Hulford's request, was to have him examined by somebody from Maudsley Hospital to see if medical treatment was required, and if medical treatment was required, then to make an order under s. 4 of the Criminal Justice Act, 1948. This court has found many instances where suspended sentences are being given as what one might call a "soft option", when the court is not quite certain what to do, and in particular they have come across many cases when suspended sentences have been given when the proper order was a probation order.

This court would like to say as emphatically as they can that suspended sentences should not be given when, but for the power to give a suspended sentence, a probation order was the proper order to make. After all, a suspended sentence is a sentence of imprisonment. Further, whether the sentence comes into effect or not, it ranks as a conviction, unlike the case where a probation order is made, or a conditional discharge is given. Therefore, it seems to the court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?

It seems to this court that South East London Sessions, if minded to accede to Mr. Hulford, should have gone through that process of elimination, when they should have stopped at a probation order. The court draws attention to that as

yet another reason why Inner London Sessions were right in not treating themselves as required to follow the course taken by South East London Sessions here.

In all the circumstances of this case, the court has come to the conclusion that the 18 months' imprisonment should stand. The appellant has now been examined by Dr. Philip Connell of the Maudsley Hospital, and Dr. Connell says that the ability to help him remains problematical at this stage, and can only suggest that further investigation of the case be made, which investigation can quite clearly take place in prison. Accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitor: *Registrar of Criminal Appeals.*

T.R.F.B.

COURT OF APPEAL, CIVIL DIVISION

(LORD DENNING, M.R., RUSSELL AND WINN, L.JJ.)

November 13, 14, 1968

GARTON v. HUNTER

Rates—Rateable value—Evidence—Actual rent—Figures reached on profits or contractor's basis.

When a particular hereditament is let at what is plainly a rack rent, or when similar hereditaments in similar economic sites are so let so that they are truly comparable, that is admissible evidence of what the hypothetical tenant would pay, but it is not in itself decisive. All other relevant considerations are admissible, e.g., figures reached on a profits basis or on the contractor's basis.

Per WINN, L.J.: In the circumstances stated evidence of the actual rent should be classified in respect of cogency as a superior category of evidence. In some, but not all, cases that category may be exclusive. Any indirect evidence, albeit relevant, should be placed in a different category reference to which may or may not be proper, or indeed necessary, according to the degree of weight of the former kind of evidence.

Dictum of SCOTT, L.J., in *Robinson Brothers (Brewers), Ltd., v. Houghton & Chester-le Street (Durham) Assessment Committee*, [1937] 2 All E.R. 298, disapproved

CASE STATED by the Lands Tribunal.

In 1958 the owner of a caravan site let 27.7 acres of the land to the ratepayer for seven years at a rent starting at £1,000 and rising to £3,000 a year. The ratepayer put on it 775 caravans. In 1962 there were negotiations whereby the ratepayer was to use some five acres of the land for cars and recreational purposes, and, to make up for those five acres, the owner let him another five acres. The ratepayer then surrendered his existing lease (which had some three years to run) and took a new lease of 33.1 acres for seven years at a rent of £3,000 for the first year and £5,000 for the following six years. The Land Tribunal assessed the rateable value of the site at £5,750. The valuation officer appealed.

W. J. Glover for the valuation officer.

Albery, Q.C., and *B. A. Marder* for the ratepayer.

LORD DENNING, M.R.: We are here concerned with a caravan site known as the Martello Tower Camp at Walton-on-the-Naze. The question is: What is the rateable value of the caravan site? In order to ascertain the rateable value, we take the words of s. 22 (1) (b) of the Rating and Valuation Act, 1925, which provides that:

"... there shall be estimated the rent at which the hereditament might reasonably be expected to let from year to year ..."

on the terms there set out.

Before the Lands Tribunal the ratepayer's valuer submitted that the value should be estimated on the contractor's basis. He took the capital cost of the land and of erecting the buildings, and allowed a percentage on the capital cost. On that basis the ratepayer's valuer put the figure at £5,100. On the other hand, the valuation officer submitted that the value ought to be estimated on the profits basis. He imagined a tenant who was going to take the camp. Such a tenant would estimate his income and expenses, take off the tenant's share, and then find the rent which he would be willing to pay. On that basis the valuation officer put the figure at £8,700. The tribunal rejected both submissions. It went its own way. It started with the actual rent which was reserved in the 1962 lease, i.e., £5,000 a year. It adjusted it because it realised that the ratepayer had an existing lease (the 1958 lease) which had three years to run. In addition the ratepayer would have a right under the Landlord and Tenant Act, 1954, to a new lease at a rent which would be less than to a stranger, because the ratepayer had himself erected buildings on that land. The tribunal started, therefore, with the rent of £5,000 a year in the 1962 lease. It added £750 for the surrender value, and arrived at a figure of £5,750. Now the valuation officer appeals to this court.

The tribunal relied on the well-known dictum of SCOTT, L.J., in *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment (Durham) Committee* (1), when he said:

"... where the particular hereditament is let at what is plainly a rack rent, or where similar hereditaments in similar economic sites are so let, so that they are truly comparable, that evidence is the best evidence, and for that reason is alone admissible: indirect evidence is excluded, not because it is not logically relevant to the economic inquiry, but because it is not the best evidence."

It is plain that SCOTT, L.J., had in mind the old rule that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded. That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in one's hands one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility. So I fear that SCOTT, L.J., was in error. The dictum has been criticised before. In *Honeyman & Co., Ltd., and Scottish Co-operative Wholesale Society, Ltd. v. Fife Assessor* (2), LORD SORN said he was not prepared to adopt the observations of SCOTT, L.J., and today counsel for the ratepayer has felt unable to support the dictum. So we reject it. I would amend the dictum so as to say that, when the particular hereditament is let at what is plainly a rack rent, or when similar hereditaments in similar economic sites are so let, so that they are truly comparable, that is admissible evidence of what the hypothetical tenant would pay, but it is not in itself decisive. All other relevant considerations are admissible. We considered all the cases on this subject in *R. v. Paddington Valuation Officer, Ex p. Peachey Property Corpn., Ltd.* (3), and pointed out that, in case after case, actual rent is no useful guide.

"The rent is only of use when it is a rent freely fixed in the market without a premium or any special conditions. And even then you may find variations from one house to the next . . .",

(1) 102 J.P. 313; [1938] 2 All E.R. 79; [1938] A.C. 321; *affg.*, [1937] 2 All E.R. 298; [1937] 2 K.B. 445.

(2) [1962] R.A. 213.

(3) 129 J.P. 447; [1965] 2 All E.R. 836; [1966] 1 Q.B. 380.

(per LORD DENNING, M.R.), in which case one looks at comparable cases to form an opinion.

In the present case of a caravan site, there are no comparables. Caravan sites are usually occupied by the owner. They are not often let out to a tenant. We have only the rent of this particular site. And it was fixed in special circumstances because of the surrender of the previous lease. So it may not be of great use. And it would be wise to take other considerations into account, such as the figures reached on a profits basis or on the contractor's basis. There is one case in the books where a caravan site was assessed on the profits basis. It was in 1957, *Bailey v. Bognor Regis Urban District Council* (1), and no one took exception to it. In my opinion, the tribunal was wrong in limiting the enquiry to the actual rent and making adjustments to it. It should also have taken into account the estimates given by the opposing valuers on the contractor's basis and the profits basis. From the sum of all the available material it should have come to an estimate of the sum which a hypothetical tenant would pay as rent for this caravan site.

Counsel for the ratepayer acknowledged that he could not support SCOTT, L.J.'s, dictum; but he urged that the actual rent was entitled to such great weight (as adjusted) that the other figures would have no influence on the result. I cannot go with that argument. It is plain that the tribunal misdirected itself. The only thing we can do is to remit the case to the tribunal to reconsider having regard to our judgment. I would allow the appeal.

RUSSELL, L.J.: It is rightly conceded by counsel that the dictum of SCOTT, L.J., on which the Lands Tribunal relied cannot be supported in law. Relying on that dictum, the Lands Tribunal put aside the two valuations, one on the contractor's basis and the other on a profits basis, put forward by the parties, as being evidence that it was not allowed to look at having regard to the existence of the lease. Further, of course, the Lands Tribunal never resolved such criticism of those valuations as was offered by the opposing sides. Counsel for the ratepayer submits that, although the Lands Tribunal admittedly erred in law in that regard, it could have made no difference to the ultimate estimation under the statute, for he says it would have been an error of law if the Lands Tribunal had, after considering these other two methods of valuation, attached any weight at all to either of them in light of the fact that there was in existence the current lease at a freely bargained rent which, he said, could be used as a starting point and converted by appropriate adjustment to a fair estimation under the statute. I am by no means satisfied that in this case the figures that may be thrown up by those two rejected approaches cannot be an aid in arriving at the estimation. I too would allow the appeal and remit the matter to the Lands Tribunal to be reconsidered in the light of the fact that in law it is not debarred from considering the two approaches suggested by the rival sides towards the valuation, or either of them.

WINN, L.J.: I agree with the judgments delivered by my Lords, with the reasoning on which those judgments are founded and with the result that is proposed. For myself, though I do this with great diffidence, I would, in order in a way to amplify what the court has already said about the dictum of SCOTT, L.J., now disapproved, suggest, in lieu of it, some such words as these: Where the particular hereditament is let on what is plainly a rack rent and there are similar hereditaments and similar economic sites which are so let that they are truly comparable, that evidence should be classified in respect of cogency as a

category of admissible evidence properly described as superior. In some, but not all, cases that category may be exclusive. Any indirect evidence, albeit relevant, should be placed in a different category. Reference to the latter category may or may not be proper, or indeed necessary, according to the degree of weight of the former kind of evidence. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Garber & Co., Croydon.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 5, 1968

R. v. ASSISTANT RECORDER OF KINGSTON-UPON-HULL. Ex parte MORGAN

Criminal Law—Sexual offence—Inciting child under fourteen to commit act of gross indecency—Institution of proceedings—Need for consent of Director of Public Prosecutions—Sexual Offences Act, 1967 (c. 60), s. 8.

The consent of the Director of Public Prosecutions is not required to the institution of proceedings against an offender for inciting a child under fourteen to commit an act of gross indecency with him, inasmuch as there is no reference to the word "incites" in s. 8 of the Sexual Offences Act, 1967.

MOTION FOR MANDAMUS on behalf of David Irvin Morgan, prosecuting solicitor of Kingston-upon-Hull, addressed to the assistant recorder of that city directing him to assume jurisdiction and try charges against the accused, Bernard Alan Clapp, of inciting a boy aged seven to commit an act of gross indecency with him contrary to s. 1 (1) of the Indecency with Children Act, 1960.

R. H. K. Frisby for the applicant.

R. A. R. Stroyan for the respondent.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the prosecutor for an order for mandamus directed to A.C. LAURISTON, Esq., the assistant recorder of the borough of Kingston-upon-Hull, directing him to assume jurisdiction and try the prosecution of the accused, Bernard Alan Clapp.

On May 27, 1968 the accused appeared before the assistant recorder and pleaded not guilty to an indictment containing one count only, namely, that he on April 6 had incited Timothy James Allerton, a boy aged seven, to commit an act of gross indecency with him, contrary to s. 1 (1) of the Indecency with Children Act, 1960. The proceedings had not been instituted with the consent of the Director of Public Prosecutions, and the point was taken at the end of the case for the prosecution that the proceedings were therefore a nullity. The assistant recorder acceded to this submission, discharged the jury from giving a verdict, and the accused was released. It is now said that the assistant recorder erred in discharging the jury and he should be ordered to try the case.

The provision providing for the consent of the Director of Public Prosecutions which was relied on is s. 8 of the Sexual Offences Act, 1967. That was an Act dealing with homosexual offences, and s. 8 provides that:

"No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of buggery

with, or gross indecency with, another man, for attempting to commit either offence, or for aiding, abetting, counselling, procuring or commanding its commission where either of those men was at the time of its commission under the age of twenty-one: . . .”.

The question is whether those words, admittedly wide words, cover the offence which is constituted by s. 1 (1) of the Indecency with Children Act, 1960, under which the accused was charged. Section 1 (1) provides, so far as it is material, that:

“ Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable . . . ”

and so on. What was urged before the assistant recorder and has been urged in this court is first that the words of s. 8 are very wide, and that, albeit the offence of inciting is not specifically there mentioned, the ground is in general covered so it is said by the words “ counselling, procuring or commanding ” the commission of the offence.

There is no doubt that s. 8 covers the case of a man committing one of the homosexual acts there referred to, not merely with another adult but with a child under 14, and accordingly if the full offence of gross indecency were alleged with a child under 14, then as it seems to me s. 8 would bite, as it were, on that offence and the consent of the Director would have to be sought. But here the offence alleged is the second limb of s. 1 (1) of the Act of 1960, namely incitement, inciting a child under 14 to such an act, an act of gross indecency. The first thing which certainly comes to my mind is that bearing in mind that that subsection in the Act of 1960 appeared specifically to meet a particular case and must have been fully in the mind of Parliament when s. 8 of the Act of 1967 was passed, there is no reference whatever to the word “ inciting ”, whereas words such as “ aiding, abetting, counselling, procuring or commanding ” are all well-known terms. Not only that, but they constitute, in my judgment at any rate, a completely different offence from the offence of incitement. It is of the essence of the offence constituted by “ counselling, procuring or commanding ” that as a result of the counselling, procuring or commanding something should have happened which either constituted the full offence or the attempt, whereas in the crime of incitement, which is a common law misdemeanour, it matters not that no steps have been taken towards the commission of the attempt or of the substantive offence. It matters not, in other words, whether the incitement had any effect at all. It is merely the incitement or the attempting to incite which constitutes the offence. Accordingly, as the charge is worded, and without knowing anything more about it, it is as it seems to me quite impossible to say that it is covered by s. 8 of the Sexual Offences Act, 1967. On that short ground I have come to the conclusion that the assistant recorder was wrong, and I would issue an order for mandamus to him to try the case.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Order for mandamus.

Solicitors: *T. D. Jones & Co., for David Morgan, Kingston-upon-Hull; Collyer-Bristow & Co., for Payne & Payne, Kingston-upon-Hull.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, J.J.)

December 9, 1968

RECORD TOWER CRANES, LTD. v. GISBEY

Road Traffic—Traffic offence—Request for information as to driver of vehicle—Duty to give information—Request signed by police sergeant—No evidence of delegation of authority from chief officer of police—Road Traffic Act, 1960 (8 and 9 Eliz. 2, c. 16), s. 232 (2) (a) (i).

By s. 232 (2) of the Road Traffic Act, 1960: "Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies—(a) the owner of the vehicle shall give such information as to the identity of the driver as he may be required to give—(i) by or on behalf of a chief officer of police . . ."

A vehicle, of which the appellants were the owners, was alleged to have been concerned in an offence to which s. 232 of the Road Traffic Act, 1960, applied, and a request for information from the appellants as to the identity of the driver under s. 232 (2) (a) (i) of the Act was made on a form signed by a police sergeant. The appellants contended that they were not obliged to supply the information on the ground that the sergeant had no delegated authority from the Commissioner of Police from the Metropolis to sign the form. The appellants were convicted under s. 232 (2) (a) (i) of the Act for failing to give the information sought. On appeal,

HELD: there was no evidence that the sergeant had the necessary delegated authority from the Commissioner to enable him to sign forms of this kind, and accordingly the request had not been made "by or on behalf of a chief officer of police". The conviction must, therefore, be quashed.

CASE STATED by Uxbridge, Middlesex, justices.

The respondent Bertram Gisbey, a police constable, preferred an information against the appellants Record Tower Cranes, Ltd. charging that on 21st March 1968 at Horton Road, West Drayton, the appellants being the owners of a vehicle the driver of which was alleged to be guilty of an offence mentioned in s. 232 (1) of the Road Traffic Act 1960, failed, when required by or on behalf of the Commissioner of Police for the Metropolis, to give information as to the identity of the driver (s. 232 (2) (a) Road Traffic Act 1960).

On the hearing of the information at Uxbridge Magistrates' Court on May 21, 1968, the following facts were found. On March 15, the driver of a motor vehicle was alleged to have committed an offence referred to in s. 232 (1) of the Road Traffic Act 1960. This vehicle was owned by the appellants. On March 21, the respondent made a written request to the appellants, the owners of the vehicle, to name the driver. There was no evidence that the Commissioner of Police for the Metropolis had personally directed the request to be made, or that the direction had been given by anyone above the rank of sergeant. The written request stated in terms that it was made on behalf of the Commissioner of Police for the Metropolis and it was signed by a police sergeant. The respondent in making the request was properly acting within the course of his duty. The appellants failed to comply with the request. The appellants owned about 40 vehicles which were variously driven by 25 employees, who did not require specific authority each time they drove a company vehicle, or by any employee who had received specific authority. No driving records were kept and there was no statutory necessity to do so. When the request was made, the secretary to the appellants enquired of each department of the company and of about 12 of the 25 employees who did not require specific authority without success.

It was contended on behalf of the appellants that there was no evidence of authorisation by the Commissioner of Police for the Metropolis for the respondent to require details of the identity of the driver; and that there was no statutory

requirement for the appellants to keep records in respect of the use of private motor vehicles, and that, therefore, they could not be responsible in criminal proceedings for failing to supply details, in view of the absence of records.

It was contended on behalf of the respondent that the written request on the face of it was made by a police sergeant on behalf of the Commissioner of Police for the Metropolis; and as the respondent was acting in the course of his duty he was clearly authorised to seek to obtain the required details on behalf of the commissioner of that police force; that although there were no specific statutory records required to be maintained by owners of private cars, the appellants, being employers and using such vehicles in the normal course of their business, ought to exercise reasonable control over the vehicles so as to be able to furnish such information if called on to do so; and that the appellants had failed to exercise reasonable diligence and were therefore criminally liable.

The justices were of opinion that a metropolitan police officer properly acting in the course of his duty acted on behalf of the Commissioner of Police for the Metropolis. In their view there was no obligation on the appellants to keep records of the drivers of their vehicles. They were satisfied that the appellants did not know the identity of the driver, but the appellants did not satisfy them that they had used due diligence to identify the driver. They considered that there was a lack of diligence in only making enquiries of about 12 of their drivers when they could have enquired of all of them, although this might have been over a period of time.

The justices convicted the appellants who appealed.

S. Ibbotson for the appellants.

B. J. Higgs for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the Middlesex Commission Area of Greater London sitting at Uxbridge, who convicted the appellants of an offence against s. 232 (2) (a) of the Road Traffic Act 1960, in failing to give information as to the identity of the driver of a vehicle which was alleged to have been involved in some offence.

The facts stated in the Case are scanty; no doubt for the reason that the real point argued there was that the appellants had not been guilty of an offence in that they did not know and could not with reasonable diligence have ascertained who the driver was; the point being that they own some 40 vehicles, and they had some 25 employees who drove the vehicles indiscriminately, and did not require any specific authority to drive any particular one; therefore it was difficult for them to ascertain who the driver of this vehicle was.

The justices came to the conclusion, and it seems to me quite rightly, that as they only made enquiries of 12 out of the 25 drivers it was really impossible for them to say that with reasonable diligence they could not ascertain the name of the driver. However, another point was taken before the justices, and that is the point which is now taken in this court. It is a highly technical point, but one on which the appellants are entitled to rely.

It is this, that there was no proof that the request was made by or on behalf of a chief officer of police as required by s. 232 (2) (a) (i). What happened was that the respondent, who is a police constable, went to the appellants' premises and handed in a form. That form is not exhibited, but as I understand it, it was a form which purported to state that information was required, and was signed by a police sergeant on behalf of the Commissioner of Police for the Metropolis, who for this purpose was the chief officer of police, within the section. The police sergeant was not called, and therefore while the respondent might be able to say that the

signature was that of the sergeant, he could not say that the sergeant had the authority of the Commissioner of Police to sign these forms on his, the Commissioner of Police's, behalf. The justices disposed of that problem, and I sympathise with them because it is a highly technical point, by finding first that the respondent who served the form, making the request contained in it, was acting properly within the course of his duty, and in giving their opinion they say:

"In our opinion a Metropolitan Police Officer properly acting in the course of his duty is acting on behalf of the Commissioner of the Metropolitan Police."

In my judgment that finding and opinion is bad. No doubt the respondent was acting for the Commissioner of Police for the Metropolis. The whole point was whether the police sergeant who had in fact signed the form had delegated authority from the Commissioner of Police to sign forms of this sort on the commissioner's behalf. In my judgment in this highly technical case there is no evidence that the police sergeant was acting on behalf of the commissioner. All that there was, was the form which on its face stated in terms that it was signed by the police sergeant on behalf of the Commissioner of Police. That clearly is not proof in itself, and there is no evidence that the police sergeant had the necessary authority. In these circumstances this court I think has no option but to quash the conviction.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Conviction quashed.

Solicitors: *Joynson-Hicks & Co., for Veale, Draper & Garrood, Basingstoke; Solicitor, Metropolitan Police.*

T.R.F.B.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD PEARCE

LORD WILBERFORCE AND LORD DIPLOCK)

December 12, 16, 1968, January 29, 1969

VICTORIA SPORTING CLUB, LTD. AND ANOTHER *v.* HANNAN

Gaming—Unlawful gaming—Roulette—Chances not favourable to all players—Money disposed of otherwise than by payment to player as winnings—Betting, Gaming and Lotteries Act, 1963, s. 32 (1) (a) (ii), (b).

By the Betting, Gaming and Lotteries Act, 1963, s 32 (1): "... any gaming shall be lawful if, but only if, it is conducted in accordance with the following conditions, that is to say—(a) ... (ii) the gaming is so conducted that the chances therein are equally favourable to all the players; and (b) that no money or money's worth which any of the players puts down as stakes, or pays by way of losses, or exchanges for tokens used in playing the game, is disposed of otherwise than by payment to a player as winnings ..."

A gaming club paid to members of the club playing roulette, putting a stake on a single number, and winning, odds of 35 to 1 in "gaming chips", which could be exchanged for money, and in addition sufficient "marker chips" to bring up the odds to 36 to 1. These "marker chips" could be exchanged for "gaming chips" or cash. Members were invited, but not compelled, to give back to the club any "marker chips" won by them, to the financial gain of the club. A majority of the members returned to the club some or all of the "marker chips" they had won.

HELD: the gaming was unlawful as not complying with the conditions laid down in s. 32 (1) (a) (ii) or those in s. 32 (1) (b).
Decision of the Divisional Court affirmed.

APPEALS by the Victoria Sporting Club and its manager, George Wynberg, from a decision of the Divisional Court (LORD PARKER, C.J., and WILLIS, J., ASHWORTH, J., dissenting) on Oct. 21, 1968, dismissing appeals of the appellants against their convictions by the Chief Metropolitan Magistrate under s. 32 (4) of the Betting, Gaming and Lotteries Act 1963.

Sir Peter Rawlinson, Q.C., and J. P. Harris for the appellant club.

J. P. Comyn, Q.C., and L. G. Krikler for the second appellant.

H. E. Hooson, Q.C., and H. J. Leonard for the respondent, Police Superintendent K. Hannan.

Their Lordships took time for consideration.

January 29, 1969. The following opinions were delivered.

LORD REID: The appellants were convicted by the Chief Metropolitan Magistrate on a charge that they were concerned on 15th February, 1968, in the organisation and management of unlawful gaming. The charge related both to roulette and to dice, but the argument before your Lordships was confined to the playing of roulette. I think it clear that the "game" of roulette is a game played between one player and the bank, each player at the table playing a separate game with the bank. It appears that roulette has generally been played so that, if the player puts a stake on a single number and that number wins, he only wins 35 times his stake. But playing at odds of 35 to 1 favours the bank by reason of the presence of a zero as well as 36 numbers. It is necessary to play at odds of 36 to 1 if the chances are to be equally favourable to the player and to the bank. The first question in this appeal is whether on the occasion in question all the players were playing at odds of 36 to 1 or whether some of them were playing at odds of 35 to 1.

Section 32 (1) of the Betting, Gaming and Lotteries Act 1963 provides that any gaming shall be lawful if it is conducted in accordance with specified conditions one of which is that "(a) . . . (ii) the gaming is so conducted that the chances therein are equally favourable to all the players". But admittedly by virtue of sub-s. (2) the accused must prove compliance with this condition.

In the Case Stated by the magistrate it is stated that the appellant club is a bona fide club conducted in a respectable and responsible manner. The essential facts as there stated are:

"(e) that the odds offered were in accordance with [para.] (b) of the agreed facts, that is to say, in roulette 36 to 1; (f) that payment of winnings in roulette was made in accordance with [para.] (c) of the agreed facts, that is to say 35 to 1 in 'gaming chips' and the differential made up to 36 to 1 in 'marker chips'; (g) that dice was played in like manner; (h) that 'marker chips' could not be used on a table to make a bet, but could be exchanged for cash or 'gaming chips'; (i) that players were invited, in a memorandum circulated to members and in notices displayed in the club premises, to return all or some of their 'marker chips' to the club; (j) that the above-named memorandum and notices emphasised that this return of 'marker chips' was voluntary; (k) that a majority of the players in fact returned some or all of their 'marker chips' to the club; (l) that the club could not continue to conduct gaming in the way it did unless at least some members accepted the invitation to return their 'marker chips'.

"7. [The magistrate] was of the opinion that as a majority of the players returned their 'marker chips' to the club, they were thereby agreeing to participate in gaming at odds of 35 to 1 and not at 36 to 1. Thus in practice, so far as most of the players were concerned, the gaming was not in fact 'so conducted that the chances therein are equally favourable to all the players'. Accordingly, [the magistrate] convicted the [appellant club] on each information and fined them £100 on each with 125 guineas costs on the first.

"8. The question for the opinion of the High Court is whether, upon the facts found, [the magistrate] came to a correct determination and decision in point of law."

The contention of the appellants is that it has been found as a fact in para. (e) above that the odds offered were 36 to 1, that it has not been found that this offer was a sham, that the winners were in fact paid chips at those odds, that all were entitled to and some did exchange all the chips which they won for cash, and that there is no basis for any other inference than that those players who chose to return marker chips to the appellant club were making donations to the appellant club independently of the game in response to the appellant club's invitation and in order to enable the appellant club to continue to conduct gaming.

I cannot regard the finding of the magistrate in para. 7 above as satisfactory. It appears to me to contain a non sequitur. It states that *as* players returned some or all of their marker chips to the appellant club, they were *thereby* agreeing to play at odds of 35 to 1 and not at 36 to 1 which he had found earlier were the odds offered.

If any one player was in fact playing at odds of 35 to 1 then an offence was committed. But if any player was in fact playing at odds different from the odds offered to him by the appellant club that could, in my opinion, only be because there had been some previous agreement or understanding between him and the appellant club or one of its servants; then, so far as that player was concerned, the odds purporting to be offered to him would not be the real odds at which he was playing, the handing to him of marker chips and his handing them back to the appellant club would be a sham, and he would be guilty of a breach of faith if he failed to hand back marker chips which he had won but tried to exchange them for cash.

Suppose a player has no clear intention in his mind as to what he will do with marker chips if he wins, the odds at which he plays cannot be one thing if he ultimately decides to keep the marker chips and cash them but something different if he ultimately decides to return them to the appellant club. And suppose he had a fixed intention to return any marker chips which he might win, but the appellant club was unaware of that; how could it be said that the appellant club had committed an offence by offering him odds of 36 to 1 and letting him play merely because without their knowledge he intended to play at 35 to 1?

The learned magistrate holds that by returning marker chips the members were thereby "agreeing" to participate at odds of 35 to 1. But it takes two to make an agreement. I think he must have meant that he inferred as a fact that one or more members had agreed with the appellant club to play at odds of 35 to 1 from the fact that the majority returned some or all of the marker chips which they had won. But we do not know from the findings how many only returned some of these chips and how many returned all, and plainly no agreement to play at 35 to 1 could be inferred from a return of only some of these chips, for by keeping some the player showed that he did not intend to play at

35 to 1. I would agree that if there were a finding that particular players always at once returned all the marker chips which they won, that would warrant an inference that the appellant club were aware of that; and that if they continued to let those particular players play in that way, they must be held to have agreed to play at 35 to 1. But there is no finding that any player always immediately returned all marker chips which he had won. I take the finding to mean that after each spin of the wheel some of the winners retained some or all of the marker chips which they had won. But each particular player may sometimes have returned all, sometimes a part, and sometimes none of the marker chips which he won and no inference could be drawn from that. It would only be possible to draw the inference of agreement to play at 35 to 1 if a particular player regularly returned all his marker chips, and the findings do not appear to me to amount to that. The appellant club was conducted in a responsible manner; it offered odds of 36 to 1; and I do not think that it is possible on these findings to infer that there was any agreement or understanding with any one player that he would play at 35 to 1 and return all the marker chips which he might win.

We were referred to the decision of the Court of Appeal in *R. v. Metropolitan Police Comr., Ex p. Blackburn* (1). If the facts found in the present case had come anywhere near the facts assumed in that case I would have no hesitation in accepting the inference drawn by the magistrate. But there LORD DENNING, M.R., said: "They give a winner two kinds of chips, ordinary chips on which he collects his winnings, and special chips which he throws back" and SALMON, L.J., said:

"The normal practice is for the players to toss the special chips back to the croupier. Clearly the players are under no illusion. They realise that these special chips are but a hollow sham devised to deceive the exceptionally gullible into thinking that the odds being paid out are 36 to 1 when in reality they are 35 to 1."

And he added that it may be that gamblers are reluctant to cash these chips. But in the present case there is nothing in the findings to suggest that any player who chooses to cash these marker chips incurs any disapproval from the appellant club or his fellow members. Indeed the finding that a majority—not even a large majority—of the players returns some or all of their chips suggests that a good many players do cash some or all of their marker chips.

We were invited, in argument, to approach this matter from the point of view that the purpose of this Act of 1963 is to prevent the commercial exploitation of gambling. But I cannot find any such purpose—on the contrary s. 32 provides that, subject to the provisions of the Act and the conditions set out, "any gaming shall be lawful". Undoubtedly gambling is a great social evil. Parliament has chosen to permit it subject to conditions. Those conditions must be observed. But it would not be proper to strain either the law or the findings of fact. If the method which Parliament has chosen leads to practical difficulties of enforcement then it is for Parliament to try again.

But there is another condition which had to be satisfied. Section 32 (1) (b) makes it a condition:

"that no money or money's worth which any of the players puts down as stakes, or pays by way of losses, or exchanges for tokens used in playing the game, is disposed of otherwise than by payment to a player as winnings."

In cases where the person conducting the gaming is not also a player the matter

is comparatively simple. Each player exchanges money for tokens which he uses in playing the game, and then at the end all the money so exchanged must be paid to one or other of the players as winnings. But in roulette the matter is rather more complicated. The club with which a member exchanges money for tokens or chips is itself a player. The game is a game between the member and the club. The member stakes chips for which he has exchanged money. The club does not stake anything, but, if the member wins, instead of paying him the money he has won, it hands him tokens representing that money. Then it invites him to surrender some of these tokens and he does so. The result is that the club keeps the money represented by these tokens instead of paying it as winnings to the member who had won it. This seems to me contrary to the spirit or general intendment of this provision but that is not enough if the club can show that the words of the provision are not wide enough to apply to it. The only possible difficulty lies in the use of the word "exchanges" in the section. In the ordinary case there are two parties involved—the player who puts down the money and the club which hands out the tokens. But I do not think that the word "exchanges" is incapable of being applied where there is only one party. If a game can be played with two implements in the player's possession, and he first uses one and then finds it better to use the second, I think that he can properly be said to have exchanged the one for the other. So here, although all the players play for money, the club finds it more convenient to exchange its money for tokens for use in playing. It certainly exchanges the members' money for tokens and I think that it can properly be said also to exchange its own money for tokens.

Section 32 (1) (b) requires that all the money for which tokens have been exchanged must be paid to a player as winnings. If the club wins chips from the member it simply keeps the money which those chips represent as its winnings. But if the member wins chips from the club the money represented by those chips must be paid to him as winnings. It may be that the member will not immediately seek payment and no offence will be committed if the club holds the money until he claims it. But what the club must not do is to appropriate any part of that money as its own. And that is what the club does when the member surrenders chips which he has won. It can make no difference whether the surrendered chips are marker chips or gaming chips because, if the game has been played at the lawful odds, the marker chips which the member receives represent money just as much as do the gaming chips. If, having received his winnings in cash, the member chooses to make a donation to the club, that is his affair. But an offence is committed if he surrenders chips as a donation to the club. I should perhaps add one further observation. There appears to be no need under this section to regard each spin of the wheel as a separate game. So there is no need to cash a member's winnings until the end of the game which may last for as long as he sits at the table. But if he is not allowed to play with marker chips and does not cash them immediately he will have to accumulate them until the end of the game and then cash them.

If this view of the meaning of this provision is correct, I am of opinion that the findings of the magistrate clearly show that an offence has been committed. Although this question is not dealt with by the magistrate or by the Divisional Court, your Lordships were informed that it had been argued. I am accordingly of opinion that these appeals should be dismissed.

LORD MORRIS OF BORTH-Y-GEST: The respective informations against the appellants were laid under s. 32 (4) of the Betting, Gaming and Lotteries Act, 1963. The allegations were that on 15th February, 1968, the

appellants were concerned in the organisation and management of unlawful gaming. It was alleged that gaming took place on the club premises of the Victoria Sporting Club. "Gaming" means the playing of a game of chance for winnings in money or money's worth. The unlawful gaming alleged was the playing of the game or a variant of the game of, in one case, roulette and in another case, dice. Those were games which are capable of being played in accordance with their ordinary rules in such a manner that the chances are not equally favourable to all the players. It was alleged that on the day in question ten or more persons were present at the gaming. That was found as a fact. The words of sub-s. (2) became applicable with the result that it was obligatory to hold that the gaming was unlawful gaming unless it was "proved that the gaming was conducted in accordance with the conditions set out in subsection (1)" of the section. Subsection (1) is as follows:

"Subject to the provisions of this Act, any gaming shall be lawful if, but only if, it is conducted in accordance with the following conditions, that is to say—

(a) that either—(i) the chances in the game are equally favourable to all the players; or (ii) the gaming is so conducted that the chances therein are equally favourable to all the players; and

(b) that no money or money's worth which any of the players puts down as stakes, or pays by way of losses, or exchanges for tokens used in playing the game, is disposed of otherwise than by payment to a player as winnings; and

(c) that no other payment in money or money's worth is required for a person to take part in the gaming."

The Chief Metropolitan Magistrate did not find that it was "proved that the gaming was conducted in accordance with the conditions" of sub-s. (1). On the other hand, his finding went beyond saying that it was not so proved. He held that the gaming was not in fact so conducted. His finding was that

"in practice, so far as most of the players were concerned, the gaming was not in fact 'so conducted that the chances therein are equally favourable to all the players.'"

The facts as found are set out in the Case Stated and must all be had in mind. The question raised is whether on those facts, the learned magistrate came to a correct determination and decision in point of law. In essence the question is whether the facts as found warranted the conclusion reached.

The facts and methods found and recorded in the Case Stated were the product of the ingenuity which had to be resorted to in consequence of the decision of this House in *Crickitt v. Kursaal Casino, Ltd.* (1). The situation that faced the organisers of the appellant club was that to play roulette with a zero and to pay odds of 35 to 1 would be illegal but profitable, while to pay odds of 36 to 1 would be legal but unprofitable. So a plan was devised. A memorandum was circulated to members expounding it. The memorandum is referred to in the written judgment of the learned magistrate which, though not annexed to the Case, was by agreement of counsel placed before the Divisional Court. The memorandum explained the decision in *Crickitt's* case to members. It then set out the scheme by which it was hoped that the embarrassment of that decision could be circumvented. It is manifest that what the organisers wished to achieve was that they should carry on so as to achieve financial results which approximated to, or were not substantially different from, those which they

(1) 132 J.P. 61; [1968] 1 All E.R. 139.

secured under the system previously adopted but now declared to be contrary to law. How, then, could they be within the law and yet secure an adequate modicum of financial return? That was their problem.

Gaming in roulette takes place in the appellant club by using chips which are purchased for money. Winnings are paid in these chips. The new scheme had to meet the situation that, for the future, the odds "offered" would have to be 36 to 1 and had, somehow, to bring about the result that to the greatest extent possible the financial outcome for the appellant club would be as if the odds were still 35 to 1. So they devised a new kind of gaming chip. In the memorandum to members these were called "peculiar denomination chips" in contrast to "regular" chips. In the proceedings they were given the name "marker chips". These new chips were to be used as follows. Though the odds offered (in roulette) were 36 to 1 (the chances in the games being then equally favourable to all players) the payment of winnings was partly in ordinary gaming chips and partly in the new peculiar denomination chips. The payment was made 35 to 1 in gaming chips just as in the days before *Crickitt's* case (1) and the remainder, the differential, made up to 36 to 1 in the new chips. So these chips represented the financial difference consequent on *Crickitt's* case. They might well have been given the name "Crickitt chips". Then, under this carefully devised scheme, members were invited to give back all or some of these new peculiar chips. The invitation was contained in the memorandum and in various notices. It followed that, if members did give back the chips, then all would be as before, and it was hoped that the law would be appeased if the modest piece of play acting of handing back these chips was accompanied by an insistence and emphasis that, of course, it was all entirely voluntary. That it was to be voluntary was in the memorandum made clear:

"In order that no member should feel *obligated* to donate these chips, notices informing him that any payment is entirely voluntary are exhibited throughout the club."

The fact that the word "obligated" was used, and that the notices were insistent in proclaiming the voluntary nature of any decision of a member to make a gift, shows how elaborate were the protestations of the organisers. But the new chips were not as other chips. There was no risk that anyone could fail to identify them. They were special in many ways. They could not be used for playing as could ordinary chips. They could, however, be taken to a desk to be exchanged for cash or for ordinary chips. They gave identity to that part of winnings which represented the difference between playing at the odds to which members had been accustomed, and playing at the odds now made obligatory. From the appellant club's point of view that part represented the difference between profit and no profit. But, notwithstanding the protestations, there was a firm but gentle reminder that if the freedom to make a gift was not considerably exercised other arrangements would have to be made:

"Whilst members continue to exercise their right to donate any part of a winning bet to the personnel or club, one is able to waive the session charge."

In the Case Stated it was found that the club could not continue to conduct gaming in the way it did unless at least some members accepted the invitation to return these new—and glaringly peculiar—chips.

The next step was to see how the members responded. It was made very plain to them how matters stood and what was hoped from them. Whether

(1) 132 J.P. 61; [1968] 1 All E.R. 139.

or not it is thought that the organisers protested overmuch they certainly made it clear to members how it was suggested that they should play the game. It would be wholly wrong to say that there was any pressure. The word "ultimatum" would also be out of place. What there was, was in effect an invitation to members to play under and to operate the new scheme. Under that scheme the odds offered would, at least nominally, have to be 36 to 1, and those members who were unwilling to play under the new scheme could obtain their winnings at 36 to 1. But those who accepted (and probably welcomed) the invitation, and who, therefore, decided to operate the new scheme, merely had to operate it in the manner which was so carefully explained. What, then, was the result? The learned magistrate found that a majority of players did, in fact, return to the appellant club some or all of the special chips. He held that the majority who returned their special chips to the appellant club were thereby agreeing to participate in gaming at odds of 35 to 1 and not at 36 to 1. In practice, therefore, so far as they were concerned, they were playing on the old terms under which the chances were not equally favourable to all players. That was what the learned magistrate found. In my opinion, his findings of fact warranted that conclusion.

It is to be remembered that for exoneration under s. 32 (2), by proof that the gaming was conducted in accordance with the conditions set out in sub-s. (1), it would have to be proved that that was so in regard to all the gaming. Stated otherwise the organisers would offend if they were concerned in the organisation and management of gaming in which one, or two, or some but not all, of the players were gaming other than in accordance with the conditions set out in sub-s. (1). When roulette is being played, each player is playing a game of chance with another player, i.e., the bank. To say that members were inspired by a succession of constantly recurring impulses of generosity involves too naive a view of the matter to be accepted. Had members wished to make gifts to the appellant club they could have done so at any time; they could have given money; they could have given ordinary chips; there was no need to invent or to use the new peculiar chips. On the findings of the learned magistrate, the reality of the situation was that a large number of players did decide that they would accept the invitation which was conveyed to them, which was an invitation to go on playing at the old odds and to do so by operating and carrying out the carefully devised and carefully explained new drill.

In agreement with the majority in the Divisional Court I consider that the chief magistrate came to a correct decision in law. I would dismiss these appeals.

LORD PEARCE: I agree with the opinion of my noble and learned friend, LORD REID, and I would, therefore, dismiss these appeals.

LORD WILBERFORCE: I concur with the opinion of my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, and would dismiss these appeals.

LORD DIPLOCK: The game of roulette is a game of chance in which the bank is the player against whom all other players bet. The other players do not bet against one another. The chances in roulette are equally favourable to all players if the bank pays the mathematical odds of 36 to 1 on winning stakes on single numbers, to which for the sake of mathematical simplicity I will confine myself. If the bank pays any shorter odds on winning stakes "en plein" the chances are no longer equally favourable to all the players.

At the Victoria Sporting Club the appellant club were the bank in the games of roulette which they organised and managed. The game was played only with "gaming chips" or tokens which the players, other than the bank itself,



obtained from the appellant club in exchange for money. Players who won "en plein" received from the bank, in addition to the token they had staked, 35 "gaming chips" and one token of a different character known as a "marker chip" which could not be used in playing the game, but could be exchanged for money with the appellant club. Players, however, were invited by the appellant club to return to the club, instead of cashing them, all or some of the marker chips which they received. Although the appellant club stressed that this would be voluntary, it also pointed out that unless sufficient marker chips were returned by players it would be necessary to institute a session charge for roulette. A majority of members responded to this invitation by returning some or all of their marker chips to the appellant club without receiving any money in exchange for them.

The result in the case of those members who responded to the invitation and returned marker chips to the appellant club was that money which these players had exchanged for tokens used in playing the game of roulette, was retained by the appellant club. The appellant club as respects that money, is in this dilemma, either it retained the money as winnings in its capacity as the bank in the game of roulette, in which case the chances were not equally favourable to all players and the conditions of para. (a) of s. 32 (1) of the Betting, Gaming and Lotteries Act 1963, were not satisfied, or it received the money in some other capacity or otherwise as winnings, in which case the conditions of para. (b) of that subsection were not satisfied.

For my part, I do not think that a game of roulette between the bank and an individual player is over so long as that player remains at the table intending to bet on another turn of the wheel. I agree with the judgment of my noble and learned friend, LORD MORRIS OF BORTH-Y-GEST, and like him would be prepared to hold that, on the true view of the facts, the appellant club made a continuing offer to play roulette against members of the club and their guests either at mathematical odds or at shorter odds at the member's or guest's option, the offer to play at shorter odds to be accepted by returning all or some of the marker chips before leaving the table. As respects those players who accepted the offer to play at shorter odds the chances were not equally favourable to them and to the bank. But it does not matter on which horn of the dilemma the appellants are impaled. I would dismiss these appeals.

Appeals dismissed.

Solicitors: John Wood & Co.; Director of Public Prosecutions.

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(DAVIES AND SACHS, L.J.J. AND THOMPSON, J.)

November 28, December 4, 1968

R. v. BRITTEN

Criminal Law—Sentence—Consecutive sentences totalling 21 years' imprisonment—Offences under Official Secrets Acts—Separate and distinct offences—Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28), s. 1 (1) (c)—Official Secrets Act, 1920 (10 & 11 Geo. 5, c. 75), s. 8 (1).

The applicant, who had been employed in a branch of the Royal Air Force of the highest confidentiality and secrecy, pleaded guilty to five counts under s. 1 (1) (c) of the Official Secrets Act, 1911, as amended. Count 1 charged him with having in January, 1967, for a purpose prejudicial to the safety or interests of the State, communicated to other persons information calculated to be, or which might be, or was intended to be, useful to an enemy. The second, third and fifth counts charged him with similar offences in December, 1967, January, 1968, and March, 1968, respectively. The fourth count charged him with recording such information. The offences charged constituted four separate offences, counts 4 and 5 being treated as constituting a single offence. The applicant was sentenced on counts 3 and 5 to fourteen and seven years' imprisonment to run consecutively, and on counts 1, 2 and 4 to five, three and five years' imprisonment concurrent. The total sentence, therefore, was one of 21 years' imprisonment. On application for leave to appeal,

HELD: though the power to impose consecutive sentences must be exercised with care, as there were over a period of 14 months four quite separate and distinct offences, connected in pursuance of a set policy or system, it could not be right to say that the applicant should be treated no differently from a person who had committed only one offence; the offences were of extreme seriousness, and, though separate, were cumulative offences; and, therefore, the sentences passed were right and proper.

APPLICATION by Douglas Ronald Britten against sentences totalling 21 years' imprisonment imposed on him at the Central Criminal Court after he had pleaded guilty to four counts of communicating to other persons information calculated to be, or which might be, or was intended to be, directly or indirectly, useful to an enemy, and one count of recording such information.

J. P. Comyn, Q.C., and D. A. Paiba for the applicant.

The Attorney-General (Sir Elwyn Jones, Q.C.), E. J. P. Cussen, and H. J. Leonard for the Crown.

Cur. adv. vult.

Dec. 4, 1968. DAVIES, L.J., read this judgment of the court. On 4th November 1968, at the Central Criminal Court before LORD PARKER, C.J., the applicant pleaded guilty to an indictment containing five counts of offences against s. 1 (1) (c) of the Official Secrets Act 1911. The first count charged him with having, in January 1967 for a purpose prejudicial to the safety or interests of the State, communicated to other persons information calculated to be or which might be or was intended to be directly or indirectly useful to an enemy. The word "enemy" in this subsection includes a possible or potential enemy. The second, third and fifth counts charged similar offences committed respectively in December 1967, January 1968, and March 1968. The fourth count, directly connected with the fifth count, charged him with having, in March 1968, recorded such information. On count 3 he was sentenced to 14 years' imprisonment and on count 5 to seven years' imprisonment consecutive; on counts 1, 2 and 4 he was sentenced to concurrent sentences of three, five and five years' imprisonment, making a total sentence of 21 years. From that sentence or those sentences he now applies for leave to appeal.

It was, of course, a heavy sentence. But the offences were of the utmost gravity. In this connection it may be right to say at the outset that the court cannot but be aware that the length of the total sentence in this case has been the subject of some public criticism. But that criticism was entirely uninformed; necessarily so, since for security reasons the nature and importance of the information which was communicated by the applicant to his Russian "contact man" were not and could not be disclosed in open court at the Old Bailey and, therefore, cannot and will not be known to the public and the press. It is perhaps not surprising that, from the story unfolded in open court before LORD PARKER, C.J., by the Attorney-General, there might be gained the impression that this affair was not of high gravity, bad enough in all conscience though it was. Some might think that the story was one of the applicant's being in the pay of the Russians for some six years and of a great deal of sometimes apparently infantile cloak and dagger manoeuvres—though fortunately without any actual dagger—culminating in the communication of what might well be comparatively trivial and unimportant information. Such a picture is far from the truth, as known to the applicant, to counsel on both sides, to LORD PARKER, C.J., to the members of this court and to the others directly concerned with this case. For the present, let it suffice to say that the applicant, employed as he was in a branch of the Royal Air Force of the highest confidentiality and secrecy, communicated to the Russians, especially in the instances covered by counts 3 and 5, information which could undermine and to some extent already has undermined the defences of this country, and might in certain eventualities endanger every man, woman and child in these islands.

There could well be added at this point the fact that the applicant's Russian "contact" here, since the applicant's return from Cyprus to this country in October 1966, has been identified as a first secretary at the Soviet embassy, no less. The gentleman in question, who had been here since May 1966, left this country in less than a week after the applicant's first appearance in a magistrates' court on the present charges. It is impossible to believe that a diplomat of such rank would have concerned and busied himself in a number of meetings at the risk of being seen with a member of the Royal Air Force, such as the applicant, unless the subject-matter of those meetings was regarded by the Russians as of the highest importance.

In the view of the court it is unnecessary to traverse in detail the long history of the applicant's connection with Russian agents, as contained in his various statements, from 1962 onwards. He has served in the Royal Air Force for over 19 years, had by 1967 reached the rank of chief technician (which, we understand, is one of the most responsible ranks below commissioned rank) and was, of course, of unblemished character. At the date of the trial he was 37 years of age. He is married with four children. According to his statements, he was first approached by a Russian agent in a museum in London in August 1962. Apparently on that very first occasion he was given £10 and was, without his knowledge, photographed in the act of receiving it. That photograph, he says, was subsequently, when he was in Cyprus, used by the Russians as a weapon against him. Later that month he was posted to Cyprus where he remained until October 1966, when he was posted back to this country. During his sojourn in Cyprus, according to him, he had a number of meetings with Russian agents and received various sums of money from them, and it is of significance to note that he states that on one occasion he gave to the Russians the names of three members of the Royal Air Force who might be recruited and, it is to be supposed, corrupted by them. What, if any, important information he passed to the

Russians during his time in Cyprus we do not know. In October 1966 he was posted back to this country to one of the stations at which the highly important and secret work on which he was engaged was carried on. Thereafter, having been approached by the first secretary, to whom I have referred and who passed under the name of "Yuri", there followed in succession the various offences to which he pleaded guilty, and various payments were made to him from time to time.

About those offences the court proposes to say no more than this. Every one of them could prove gravely damaging to the security of this country. In particular the communications which he made in January 1968 (count 3) and in March 1968 (counts 4 and 5, involving the copying and the supplying of a copy of a secret document) were absolutely certain to interfere with and handicap the defences of this country and might well, as I have indicated, in certain events prove disastrous to us all.

Counsel, in his argument for the applicant, does not suggest that there is no power to impose consecutive sentences; but he points out that the maximum sentence for any one offence under s. 1 of the Official Secrets Act 1911 is 14 years' imprisonment and he argues that the present offences were really all part of one series and called for concurrent sentences, and that in any event the overall sentence here was in the circumstances too severe. It is true that the power to pass consecutive sentences must be exercised with care, but the court cannot agree that it would be right to regard this case as merely a single series of offences calling in effect for a single sentence only. The offences in the indictment cover a period of 14 months and constitute four quite separate and distinct offences, treating counts 4 and 5, as I have already said, as one offence. It cannot, in our view, be right to say that if over a period an accused commits a large number of offences, of whatever kind, in pursuance of a set policy or system, he should be treated no differently from an accused who has committed only one offence. The seriousness of these offences is, of course, a matter to be assessed on the evidence before them by the court, who are not by any means bound by the views expressed on behalf of the Crown or indeed by LORD PARKER, C.J., who had before him precisely the same materials as we have had. It is right, however, to note, as an indication of the way in which the mind of LORD PARKER, C.J. was working, in a passage in the transcript, a question put by him to the Attorney-General:

"Before you sit down, Mr. Attorney, two questions. Would I be right in thinking that those instructing you really considered that counts 3 and 5 were the most serious?"

to which the Attorney-General answered: "Yes." It will be necessary to return later to this in order to see LORD PARKER, C.J.'s second question.

The members of this court have considered all the matters and facts which were before LORD PARKER, C.J., in closed court. We have been fully apprised of the nature of the information which on each occasion was communicated by the applicant and the possible repercussions of such communications. Our conclusion is that they were all extremely serious offences, that counts 3 and 5 were by far the most serious, that they were separate but cumulative offences and that the case is not one which could properly be dealt with by the imposition of a total sentence of, or within, the maximum laid down by the Act of 1911 for one offence. It may be convenient to pass now to a quite different point, though one of some importance. In the transcript, the second question of LORD PARKER, C.J., to the Attorney-General was this:

"And, unlike some other cases of a similar character, would I be right in thinking that there is no suggestion that [the applicant] still has information which would be useful to an enemy or to a foreign country?"

to which the Attorney-General replied:

"My Lord, I would think that he may well have useful information which would be of value to a foreign country."

That answer was criticised by counsel for the applicant in the course of his speech in mitigation, and the Attorney-General intervened to say:

"If what is said in his statement is true, there is a great deal of information which he has which would be of a great deal of assistance to a potential enemy."

Counsel for the applicant now, as then, argues that on the applicant's release from what must admittedly in any event be a long sentence, such information or "know-how" as he possesses or has possessed will be out of date and of no use to a potential enemy. There could be force in that argument and the court is thus of the opinion that, in considering the appropriateness of this sentence, no great weight was or should be given to this factor.

The remainder of the applicant's case is really a matter of pleading in mitigation for leniency. Counsel for the applicant emphasised the innate distaste for long sentences and the potential effect of prolonged incarceration. He suggests that, so far as deterrence is concerned, a sentence of 14 years' imprisonment would be just as effective as one of 21 years. Such factors are naturally present to the mind of any court whenever consideration has to be given to the imposition of a really long sentence, but they cannot be allowed to deflect it in appropriate cases from an unwelcome duty. It is pointed out that the applicant, once he had started on the slippery slope of treachery, was blackmailed into continuing by threats of exposure to the British authorities, of violence to himself and his family and even of death, and that once in Cyprus he was, he says, actually physically assaulted. All this may be true, but to regard compliance with threats as an excuse would be to put a premium on their use. And it is to be remembered that all the time, he was receiving money from the Russians, precisely how much is uncertain; and there is a revealing observation which he made to the investigating officer when he said, referring to an incident in Cyprus: "My idea was to get as much money as I could to buy a house when I got back home." Whether a man who engages in activities of this kind through sheer financial greed while drawing comfortable service emoluments is worse or better than a man who does so on account of sincerely held political beliefs and convictions may be a matter of debate; but this man's motives were only too clear.

We were referred by counsel for the applicant to a number of other cases, for purposes of comparison, in which long sentences have been passed. The court, however, does not find such comparisons of any great assistance. It is difficult to compare one espionage case with another since the full facts of any case are seldom available. Still less easy is it to compare a case, for example, of armed robbery, where injury and loss are occasioned to one or more individuals, with a case such as the present where injury has been and may be done to the whole community. Contraventions of the Official Secrets Acts which prejudice the defence of this country and which may thus tend to endanger the lives of members of the community are to a considerable degree in a category of their own. The perils they create and thus the sentences that are appropriate in the interests of the community will, of course, vary according to the circumstances

of the particular case. But one factor stands out. In recent decades the dangers of mass destruction of life and property at the hands of an opposing power have increased to an outstanding degree, and it follows that as the dangers increase so does the need in protection of society for sentences of deterrent length.

Learned counsel for the applicant, in the course of his address to the court, referred to the concluding words of the judgment of the Court of Criminal Appeal read by HILBERY, J., in *R. v. Blake* (1):

"It is of the highest importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held by all ordinary men and women in utter abhorrence but also should receive when brought to justice the severest possible punishment. This sentence had a threefold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country."

It is not seriously disputed by the defence that those words apply substantially to the present case.

In the opinion of the court the sentences were in the circumstances of this case right and proper. Hence the application was refused.

Application refused.

Solicitors: Ward, Bowie & Co.; Director of Public Prosecutions.

T.R.F.B.

(1) 125 J.P. 571; [1961] 3 All E.R. 125; [1962] 2 Q.B. 377.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 12, 1968

TAYLOR v. AUSTIN

Road Traffic—Driving with blood-alcohol proportion exceeding prescribed limit—Disqualification—Special reasons—Driving ability not impaired—Accident not fault of defendant—Road Safety Act, 1967 (c. 30), s. 1 (1).

On a conviction of driving with a blood-alcohol proportion exceeding the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, neither the fact that the driving ability of the defendant was not impaired nor the fact that his driving was not the cause of an accident can amount to a special reason for not ordering disqualification for holding a driving licence.

CASE STATED by a metropolitan stipendiary magistrate.

On 16th July 1968, the respondent, Stanley Austin, was charged at Greenwich magistrates' court by the appellant, Samuel Taylor, at Sydenham police station with driving a motor vehicle on a road having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test of a specimen subsequently provided by the respondent under s. 3 of the Road Safety Act, 1967, exceeded the prescribed limit at the time the said specimen was provided, contrary to s. 1 (1) of the Act. The respondent pleaded guilty to the charge. Neither the respondent nor appellant was legally represented.

The appellant recited the following facts in support of the said charge: At 10.55 p.m. on 18th June 1968, the respondent was driving a Rover motor car

east along Perry Vale, Forest Hill, S.E.23, when he was involved in an accident with another motor vehicle about a mile from his home. The officer in charge of the case in answer to questions by the magistrate said that the respondent was in no way to blame for the accident and that there was no suggestion that his ability to drive was impaired; and that the taking of the alcohol test was routine procedure following an accident. The respondent was requested to take a breath test which proved positive. P.c. Cooke thereupon arrested the respondent and conveyed him to Sydenham police station, where the appellant requested the respondent to take a further breath test, which again proved positive. The respondent subsequently supplied a specimen of his blood which on analysis was found to contain not less than 176 milligrammes of alcohol in 100 millilitres of blood. The appellant further informed the magistrate that there were no previous convictions, apart from a conviction on 31st May 1965 at West London Magistrates' Court for driving without reasonable consideration, when he was fined £5 and ordered to pay £11 15s. costs, and his licence ordered to be endorsed, recorded against the respondent, and that he was a surveyor by occupation. The note of the clerk of the court stated that the respondent did give evidence. The magistrate could not remember if he came into the witness box or not. He accepted that he should have given evidence on oath. He was not referred to any case.

The respondent contended that, notwithstanding his plea of guilty to the offence, the magistrate should not make an order disqualifying him for holding or obtaining a driving licence for a period of not less than 12 months, or at all, on the grounds that his driving ability was not impaired. He also said that disqualification from driving would cause him undue hardship and that his licence was essential for his professional work. He contended that he was in no way to blame for the accident which was the fault of the other driver concerned. The magistrate asked the appellant if there were any summonses relating to the accident outstanding against the respondent and the appellant told him that there were not.

On consideration of the facts and matters placed before him, the magistrate convicted the respondent of the offence and imposed a fine of £35 on him in respect thereof, and made an order that he should pay the sum of five guineas in costs; he further ordered that the particulars of the conviction should be endorsed on the respondent's driving licence in accordance with s. 7 of the Road Traffic Act 1962. He made no order under s. 5 (2) (a) of the Road Safety Act 1967, and s. 5 (1) of the Road Traffic Act 1962, disqualifying the respondent for holding or obtaining a driving licence for a period of not less than 12 months for the following special reasons: (a) driving ability not impaired (admitted by police); (b) accident no fault of the respondent; and (c) undue hardship—licence essential for professional work.

The magistrate stated the grounds for not imposing an order of disqualification on the respondent in open court, and caused the same to be entered in the register of the court's proceedings. The main grounds for not disqualifying the respondent were the appellant's admissions as to the respondent's ability to drive; taking the view that although the respondent's ability to drive was not in fact impaired was irrelevant on the question of guilt, (the respondent pleaded guilty), it was nevertheless very relevant when considering the appropriate sentence to pass in all the circumstances.

The prosecutor appealed to the Divisional Court, contending that there were no special reasons within the meaning of s. 5 (1) of the Road Traffic Act 1962, and that in the premises the magistrate was obliged in accordance with the provisions of s. 5 (2) (a) of the Road Safety Act 1967 and of s. 5 (1) of the Road

Traffic Act 1952, to make an order disqualifying the respondent for holding or obtaining a driving licence for a period of not less than 12 months.

Ann Goddard for the appellant.

The respondent appeared in person.

LORD PARKER, C.J.: This is an appeal by the prosecutor by way of Case Stated from a decision of one of the metropolitan magistrates sitting at Greenwich, who held that there were special reasons which entitled him not to disqualify the respondent in respect of an offence contrary to s. 1 of the Road Safety Act 1967. The respondent pleaded guilty to that offence, and indeed the analysis of the blood showed that it contained a little over double the prescribed limit, namely 176 milligrammes of alcohol in 100 millilitres of blood.

The matter came to light because, at about 10.55 p.m. on 18th June 1968, the respondent, driving his car, came in collision with a taxi-cab and, as a result, the police were soon on the scene and breath tests were taken. It is extremely hard on the respondent if he is disqualified; he is a surveyor and depends on getting about the country, and, as he has said in this court today, it does not end there, because if he cannot, he will possibly for all time lose his clients. He pressed his points before the magistrate, and the magistrate finally held that he found that there were special reasons, on three grounds: first, driving ability not impaired; indeed it was admitted by the appellant that his driving was in no way the cause of this accident, and there was no suggestion that in fact his driving ability was impaired. So far as that is concerned, this court is quite clear that that cannot be a special reason. It is no doubt a mitigating circumstance, but not a mitigating circumstance such as to amount to a special reason. The second ground was that the accident was no fault of the respondent. That really is wrapped up in the earlier ground. This offence has got nothing to do with impairment or accident, it is Parliament trying to arrive at some certainty and make it an offence whenever there is an excess of alcohol over the prescribed limit. Finally, the third reason was the undue hardship that results to the respondent. One cannot help being sorry for him, but for years and years it has been held that financial hardship to a convicted person cannot amount to a special reason for refusing to disqualify him. Sorry as I am for the respondent, the case is really too plain for words. There are no special reasons; the case must go back to the magistrate with a direction to disqualify.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Appeal allowed.

Solicitor: *Solicitor, Metropolitan Police* (for the appellant).

T.R.F.B.



QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 12, 1968

BREWER v. METROPOLITAN POLICE COMMISSIONER

Road Traffic—Driving when unfit to drive through drink—Disqualification—Special reasons—Defendant's drink "laced" without his knowledge—Prior inhalation of fumes with alcoholic content unknown to defendant—Road Traffic Act, 1960 (8 & 9 Eliz. 2, c. 16), s. 6 (1)—Road Traffic Act, 1962 (10 & 11 Eliz. 2, c. 59), s. 5 (1).

Either the fact that the defendant's drink has been "laced" without his knowledge, or the fact that, prior to consuming a small quantity of alcohol he had inhaled fumes with an alcoholic content of which he was unaware, can amount to a special reason justifying a court from ordering disqualification for holding a driving licence in a case where, in the absence of a special reason, disqualification would be obligatory.

CASE STATED by the Middlesex Area Quarter Sessions of Greater London.

On 23rd November 1967 at about 12.05 a.m., the appellant, Kenneth Albert Brewer, was arrested by Albert Yates, P.c. 364 X Division, for driving his motor car whilst unfit through drink at St. John's Road, Uxbridge, Middlesex, contrary to s. 6 (1) of the Road Traffic Act 1960. On that day, the appellant, who was not represented, appeared at Uxbridge Magistrates' Court and pleaded guilty to the charge and was fined the sum of £40 and 10 guineas costs, his licence was endorsed and he was disqualified from holding or obtaining a driving licence for 12 months. On 30th November 1967, he gave notice of appeal to quarter sessions against the sentence insofar as it related to disqualification on the grounds that there were special reasons in law why the court, in exercise of its discretion, should not order the penalty of disqualification.

On the hearing of the appeal on Jan. 31, 1968, the following facts were proved or admitted. The appellant was a director of an engineering firm who for some hours prior to his arrest (from 7.30 to 11.30 p.m.) was operating a de-greasing vat on his firm's premises. The vat had an evaporation area of 44½ inches by 31½ inches and contained 20 gallons of a chemical called trichloroethylene (a solvent for de-greasing metals) heated to a temperature of 180°F. The appellant who employed a staff of some 40 persons had only used the vat previously himself on a few occasions for a short time and had never been exposed to the fumes of the chemical for a period of four hours. Contrary to the regulations governing the use of this chemical which were pinned to the wall (but had not been read by the appellant) and were unknown to him, because the vats were usually operated by his staff, no extractor was in operation on that night and there was no ventilation system working in the plant. The effects of inhaling the vapour of the said fumes were unknown to the appellant. At approximately 11.30 p.m. before leaving for home, the appellant consumed three small whiskeys with water which according to Professor Camps' evidence would have the effect of causing a concentration of alcohol in the blood of 45 to 50 milligrammes per 100 millilitres. The appeals committee were of opinion that the amount of alcohol on its own did not render the appellant unfit to drive through drink. At approximately 12.05 a.m., the appellant was seen by the occupant of a police car to be driving erratically at a slow speed and was stopped. He was subsequently arrested and was certified by a doctor as being unfit to drive through drink. Professor Camps gave evidence that trichloroethylene operated as an anaesthetic and induced drowsiness (which accorded with the appellant's account of how he felt) and that it was dangerous to lean over a vat in the aforementioned circumstances for any length of time

without proper ventilation. The effect of inhalation of fumes for such a period in the aforementioned circumstances coupled with a small consumption of alcohol would be cumulative, as the chemical itself was a form of alcohol thereby rendering a driver unfit to drive without the driver realising it. It was contended by the appellant that the above circumstances constituted special reasons in law whereby, in the exercise of its discretion, the court should not disqualify the appellant. It was conceded by the respondent that the above circumstances were capable of amounting to special reasons in law.

Quarter sessions were of opinion that the further questions for the court were, whether, in all the circumstances of the case, the facts found amounted to special reasons, and, if so, they were prepared to exercise their discretion in the appellant's favour.

They were of opinion that the circumstances did not amount to special reasons in law alternatively they were not prepared to exercise their discretion in the appellant's favour for the following reasons. The appellant had used the substance on the previous occasions. He was a director of a company with a staff of about 40 persons a number of whom had used the substance regularly during a period of three years. He failed to use the ventilating system. Due to the smell of the substance it was found that he ought to have known that he should have used it. He did not see or read the manufacturers' pamphlet on the wall of the premises giving warning of the chemical's improper use. He was described as grossly negligent in so acting by Professor Camps and, accordingly they dismissed the appeal.

The appellant appealed to the Divisional Court.

J. B. R. Hazan for the appellant.

Ann Goddard for the respondent, the Metropolitan Police Commissioner.

LORD PARKER, C.J.: In November 1967, the appellant pleaded guilty to a charge of driving a motor car whilst unfit through drink at Uxbridge in Middlesex contrary to s. 6 (1) of the Road Traffic Act 1960. He was fined by the justices and disqualified from driving for 12 months. He appealed to quarter sessions insofar as the sentence related to disqualification, alleging that there were special reasons in law why the court, in exercise of its discretion, should not order disqualification. Quarter sessions, being the appeals committee of the Middlesex Area Quarter Sessions of Greater London, rejected his submission, and disqualified him, and it is against that decision that the appellant now appeals to this court by way of Case Stated.

It is in some ways a curious case. [His LORDSHIP stated the facts and continued:] The evidence of Professor Camps, which was accepted as unchallenged, was that trichloroethylene contains alcohol and operates as an anaesthetic inducing drowsiness. He said:

"The effect of inhalation of fumes for such a period . . . coupled with a small consumption of alcohol would be cumulative, as the chemical itself was a form of alcohol thereby rendering a driver unfit to drive without the driver realising it."

It was in those circumstances that it was conceded by the respondent, and as quarter sessions say quite rightly, "that the above circumstances were capable of amounting to special reasons in law". I think myself that all they meant by that was: looked at perfectly generally alcohol exacerbated by something else is capable of being a special reason; if somebody laces another's drink, that, looked at quite loosely, is capable of being a special reason. Whether it is in truth a special reason depends, in the illustration which I gave, on whether a man knows his drink has been laced. On those facts, quarter sessions stated:

"We were of opinion that the said circumstances did not amount to special reasons in law alternatively we were not prepared to exercise our discretion in the appellant's favour for the following reasons . . .",

and they then set out five reasons which I must refer to in a moment.

It seems to me that those reasons which they set out are really the reasons why they said that what was capable of amounting to special reasons, did not amount to special reasons. It is true they list them under the heading of "Discretion", but having gone through this process of saying: Are these the sort of circumstances, looked at generally, which are capable of being "special"? then they have to go on to say: Are they special in the sense that the appellant had no reason to think that what he was doing was inhaling alcohol fumes, or that it was unsafe to take drink after what he had been doing? With that preliminary observation, I will look at the reasons they gave. The first one was: "The appellant had used the substance on the previous occasions." In connection with that, there are facts found: they are that the appellant who employs a staff of some 40 persons, had only used the vat previously himself on a few occasions for a short time, and had never been exposed to the fumes of the chemical for a period of four hours, and also that the effects of inhaling the vapour of the said fumes were unknown to the appellant. The other reasons were:

"(ii) He was a director of a company with a staff of about 40 persons a number of whom had used the substance regularly during a period of three years. (iii) He failed to use the ventilating system. Due to the smell of the substance we found that he ought to have known that he should have used it. (iv) He did not see or read the manufacturers' pamphlet on the wall of the premises giving warning of the chemical's improper use. (v) He was described as grossly negligent in so acting by Professor Camps."

I have read them all together because it seems to me that they really amount to this: we quite accept that the appellant did not know what was the effect of inhaling these fumes, but we think he ought to have known and we think he was negligent in not finding out.

One must analyse this in a little more detail. There was in fact a notice referred to in the Case as "regulations" which was in the form not really of a notice, but of pages from a pamphlet in comparatively small print which was nailed or stuck on the walls or on to a board, and that, true, drew attention to the fact that it was dangerous to put one's head over the vat without there being some ventilating system or extractor fan in operation. It also said that it might produce drowsiness, and in large doses unconsciousness, but that that would clear up as soon as one got into the open air. The one thing that it did not do was to give any warning of the chemical giving off alcohol by way of fumes, and no warning whatever that it was therefore dangerous to take further alcohol afterwards, or to put one's head over the vat after one had taken alcohol. What, as it seems to me, quarter sessions have said to themselves is this: well, we think that the appellant ought to have known by the smell that this was a chemical which, when heated up, ought to be in a room properly ventilated, and that if he had realised all that, he would not have done what he did, namely work there without proper ventilation, or perhaps work there at all. Of course, if he had not been subject to the alcohol fumes, then the three small whiskys he had would not have affected him.

In my judgment, that is approaching the issue in the wrong way. Once it is accepted that he in fact did not know that these fumes had any alcohol in them, then the only possibility of holding the appellant, as it were, liable on the basis of negligence or constructive knowledge would be if there were circumstances under

which he was fixed with the knowledge of the alcohol content. There is nothing whatever of that sort in the regulations or otherwise to give him any warning of the matter, and accordingly, in my judgment, the general circumstances which were capable of amounting to a special reason did in the circumstances of this case amount to such a special reason. True, it is, that there is still a discretion in the court, because the Road Traffic Act, 1962, provides that the mandatory disqualification shall be applied unless the court for special reasons thinks fit to order otherwise. The only question then is whether there could be said to be any circumstances here to make a court take another course, namely not to disqualify. In my judgment, having considered the matters which are referred to as matters of discretion in deciding whether the circumstances do amount to special reasons in fact, one is left with no matters at all on which the discretion would fall to be exercised. It seems to me that in this case the only possible course is for the court to send the case back to the justices saying that there being in law special reasons in this case, there would appear to be no reason whatever why they should not treat it as a special reason which will enable them not to disqualify.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Appeal allowed.

Solicitors: *Turberville Smith & Co., Uxbridge; Solicitor, Metropolitan Police.*
T.R.F.B.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD PEARCE, LORD
WILBERFORCE AND LORD DIPLOCK)

November 27, 28, December 2, 3, 4, 1968, January 23, 1969

SWEET v. PARSLEY

Criminal Law—Mens rea—Presumption—Displacement—Construction of statute.

Mens rea is an essential ingredient of every criminal offence unless some reason can be found for holding that it is not necessary. Where an offence is created by statute the words of the section creating the offence must be looked at to see whether, either expressly or by necessary implication, they displace the general rule or presumption that mens rea is a necessary prerequisite before guilt of the offence can be found. Though sometimes help in construction is derived from noting the presence or absence of the word "knowingly", no conclusive test can be laid down as a guide in finding the fair, reasonable, and common-sense meaning of the language of the statute. The mere absence of "knowingly" is not enough to displace the presumption. The fact that other sections of the Act expressly require mens rea, e.g., because they contain the word "knowingly", is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence it is necessary to go outside the Act and examine all the relevant circumstances in order to establish that this must have been the intention of Parliament.

Dangerous Drugs—Offence—Cannabis—Management of premises used for purpose of smoking cannabis—Need to prove mens rea—"Purpose"—Dangerous Drugs Act, 1965, s. 5 (b).

By s. 5 of the Dangerous Drugs Act, 1965: "If a person . . . (b) is concerned in the management of any premises used for [the purpose of smoking cannabis] he shall be guilty of an offence . . ."

This provision does not create an absolute offence, and, therefore, a person charged under it cannot be convicted without proof of mens rea; the purpose mentioned in para. (b) is not the purpose of the smoker, but is the purpose of the manager of the premises or a purpose known to and acquiesced in by him.

APPEAL by Stephanie Lavinia Sweet against an order of the Divisional Court (LORD PARKER, C.J., ASHWORTH and BLAIN, JJ.) dismissing her appeal against her conviction by justices for the county of Oxford sitting at Woodstock on a charge brought by the respondent, Edmund Raymond Parsley, a police sergeant, that, on June 16, 1967, she was concerned in the management of premises which were used for the purpose of smoking cannabis or cannabis resin, contrary to s. 5 (b) of the Dangerous Drugs Act, 1965.

Rose Heilbron, Q.C., and I. Brownlie for the appellant.

Douglas Draycott, Q.C., and R. M. A. C. Talbot for the respondent.

Their Lordships took time for consideration.

23rd January. The following opinions were delivered.

LORD REID: The appellant was convicted at Woodstock Petty Sessions on September 14, 1967, on a charge that, on June 16, 1967, she was concerned in the management of certain premises at Fries Farm, Oxfordshire, which were used for the purpose of smoking cannabis, contrary to s. 5 (b) of the Dangerous Drugs Act, 1965. She was fined £25 and ordered to pay £12 18s. costs. It appears from the Case stated by the justices that the tenant of this farm had sublet the farmhouse to her at a rent of £28 per four weeks. She was a teacher at a school in Oxford and she had intended to reside in this house and travel daily by car to Oxford. This proved to be impracticable, so she resided in Oxford and let rooms in the house at low rents to tenants, allowing them the common use of the kitchen. She retained one room for her own use and visited the farm occasionally to collect her letters, to collect rent from her tenants, and generally to see that all was well. Sometimes she stayed overnight, but generally she did not. On June 16, while she was in Oxford, the police went to the premises with a search warrant. They found receptacles hidden in the garden which contained cannabis resin and L.S.D. They also found in the kitchen cigarette ends containing cannabis, and an ornamental hookah pipe which belonged to the appellant and which had, admittedly without her knowledge, been used for smoking this substance. The justices found that

"... she did not enter the rooms of tenants except by invitation and she had no reason to go into their rooms. Her own room was occasionally used in her absence by other persons who lived in the house. She had no knowledge whatever that the house was being used for the purpose of smoking cannabis or cannabis resin. Once or twice when staying overnight at the farmhouse the appellant shouted if there was excessive noise late at night, but otherwise she did not exercise any control over the tenants except that she collected rent from them."

A Divisional Court dismissed her appeal, holding that she had been concerned in the management of those premises. The reasons given for holding that she was managing the property were that she was in a position to choose her tenants, that she could put them under as long or as short a tenancy as she desired, and that she could make it a term of any letting that smoking of cannabis was not to take place. All these reasons would apply to every occupier who lets out parts of his house or takes in lodgers or paying guests. But this was held to be an absolute offence following the earlier decision in *Yeandel v. Fisher* (1).

(1) 129 J.P. 546; [1965] 3 All E.R. 158; [1966] 1 Q.B. 440.

How has it come about that the Divisional Court has felt bound to reach such an obviously unjust result? It has, in effect, held that it was carrying out the will of Parliament because Parliament has chosen to make this an absolute offence. And, of course, if Parliament has so chosen, the courts must carry out its will, and they cannot be blamed for any unjust consequences. But has Parliament so chosen? I dealt with this matter at some length in *Warner v. Metropolitan Police Comr.* (1). On reconsideration I see no reason to alter anything which I there said. But I think that some amplification is necessary.

Our first duty is to consider the words of the Act. If they show a clear intention to create an absolute offence, that is an end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to mens rea, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.

Where it is contended that an absolute offence has been created, the words of ALDERSON, B., in *A.-G. v. Lockwood* (2) have often been quoted:

"The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain literal and grammatical meaning of the words in which they are expressed unless that construction leads to a plain and clear contradiction of the apparent purpose of the act or to some palpable and evident absurdity."

That is perfectly right as a general rule and where there is no legal presumption. What, however, about the multitude of criminal enactments where the words of the Act simply make it an offence to do certain things but where everyone agrees that there cannot be a conviction without proof of mens rea in some form? This passage, if applied to the present problem, would mean that there is no need to prove mens rea unless it would be "a plain and clear contradiction of the apparent purpose of the Act" to convict without proof of mens rea. But that would be putting the presumption the wrong way round, for it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary. It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example, because they contain the word "knowingly", is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say "must have been", because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.

What, then, are the circumstances which it is proper to take into account? In the well-known case of *Sherras v. De Rutzen* (3), WRIGHT, J., only mentioned the subject-matter with which the Act deals. But he was there dealing with

(1) 132 J.P. 378; [1968] 2 All E.R. 356.

(2) (1842), 9 M. & W. 378; *affd.*, 10 M. & W. 464.

(3) 59 J.P. 440; [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

something which was one of a class of acts which "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty". It does not in the least follow that, when one is dealing with a truly criminal act, it is sufficient merely to have regard to the subject-matter of the enactment. One must put oneself in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to *mens rea* means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place, a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma. So he would have to consider whether, in a case of this gravity, the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape. And equally important is the fact that, fortunately, the Press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic by undermining public confidence in the justice of the law and of its administration. But I regret to observe that, in some recent cases where serious offences have been held to be absolute offences, the court has taken into account no more than the wording of the Act and the character and seriousness of the mischief which constitutes the offence.

The choice would be much more difficult if there were no other way open than either *mens rea* in the full sense or an absolute offence; for there are many kinds of case where putting on the prosecutor the full burden of proving *mens rea* creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards *mens rea* to the accused, so that, once the necessary facts are proved, he must convince the jury that, on balance of probabilities, he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method; but one of the bad effects of the decision of this House in *Woolmington v. Director of Public Prosecutions* (1) may have been to discourage its use. The other method would be in effect to substitute in appropriate classes of cases gross negligence for *mens rea* in the full sense as the mental element necessary to constitute the crime. It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence. A variant of this would be to accept the view of CAVE, J., in *R. v. Tolson* (2). This appears to have been done in Australia where authority appears to support what DIXON, J., said in *Proudman v. Dayman* (3):

"As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence."

It may be that none of these methods is wholly satisfactory, but at least the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided.

If this section means what the Divisional Court have held that it means, then hundreds of thousands of people who sublet part of their premises or take

(1) [1935] All E.R. Rep. 1; [1935] A.C. 462.

(2) 54 J.P. 4, 20; [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168.

(3) (1941), 67 C.L.R. 536.

in lodgers or are concerned in the management of residential premises or institutions are daily incurring a risk of being convicted of a serious offence in circumstances where they are in no way to blame. For the greatest vigilance cannot prevent tenants, lodgers or inmates or guests whom they bring in from smoking cannabis cigarettes in their own rooms. It was suggested in argument that the appellant brought this conviction on herself because it is found as a fact that, when the police searched the premises, there were people there of the "beatnik fraternity". But surely it would be going a very long way to say that persons managing premises of any kind ought to safeguard themselves by refusing accommodation to all who are of slovenly or exotic appearance, or who bring in guests of that kind. And, unfortunately, drug taking is by no means confined to those of unusual appearance. Speaking from a rather long experience of membership of both Houses, I assert with confidence that no Parliament within my recollection would have agreed to make an offence of this kind an absolute offence if the matter had been fully explained to it. So, if the court ought only to hold an offence to be an absolute offence where it appears that that must have been the intention of Parliament, offences of this kind are very far removed from those which it is proper to hold to be absolute offences.

I must now turn to the question what is the true meaning of s. 5 of the Act of 1965. It provides:

"If a person—(a) being the occupier of any premises, permits those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin (whether by sale or otherwise); or (b) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act."

We are particularly concerned with para. (b), and the first question is what is meant by "used for any such purpose". Is the "purpose" the purpose of the smoker or the purpose of the management? When in *Warner's* case (1) I dealt briefly with *Yeandel's* case (2) I thought it was the purpose of the smoker, but fuller argument in the present case brought out that an identical provision occurs in s. 8 (d) which deals with opium. This latter provision has been carried on from the Dangerous Drugs Act, 1920, and has obviously been copied into the later legislation relating to cannabis. It would require strong reasons—and there are none—to justify giving this provision a new meaning in s. 5 different from that which it had in the Act of 1920 and now has in s. 8 of the Act of 1965. I think that in s. 8 it is clear that the purpose is the purpose of the management. The first purpose mentioned is the purpose of the preparation of opium for smoking which can only be a purpose of the management. I believe that opium cannot be smoked casually anywhere at any time as can a cannabis cigarette. The section is dealing with "opium dens" and the like when the use of opium is the main purpose for which the premises are used. But it is a somewhat strained use of language to say that an ordinary room in a house is "used for the purpose" of smoking cannabis when all that happens is that some visitor lights a cannabis cigarette there. Looking to the origin and context of this provision, I have come to the conclusion that it cannot be given this wide meaning. No doubt this greatly reduces the scope of this provision when applied to the use of cannabis. But that is apt to happen when a draftsman simply copies an existing provision without regard to the different circumstances in which it is to operate. So if the purpose is the purpose of the management the question whether the offence with regard to opium in 1920 and now with regard to cannabis

(1) 132 J.P. 378; [1968] 2 All E.R. 356.

(2) 129 J.P. 546; [1965] 3 All E.R. 158; [1966] 1 Q.B. 440.

is absolute can hardly arise. It could only arise if, although the manager not only knew about cannabis smoking but conducted the premises for that purpose, some person concerned in the management had no knowledge of that. One would first have to decide whether a person who is not actually assisting in the management can be regarded as being "concerned in the management" although ignorant of the purpose for which the manager was using the premises. Even if such a person could be regarded as "concerned in the management" I am of opinion that, for the reasons which I have given, he could not be convicted without proof of mens rea. I would allow the appeal and quash the appellant's conviction.

LORD MORRIS OF BORTH-Y-GEST: It has frequently been affirmed and should unhesitatingly be recognised that it is a cardinal principle of our law that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence. It follows from this that there will not be guilt of an offence created by statute unless there is mens rea or unless Parliament has by the statute enacted that guilt may be established in cases where there is no mens rea. To this effect were the words of WRIGHT, J., in *Sherras v. De Rutzen* (1) and in *Derbyshire v. Houlston* (2). In the judgment of the Privy Council in *Lim Chin Aik v. Reginam* (3), the principle was amply expressed. It was said: "That proof of the existence of a guilty intent is an essential ingredient of a crime at common law is not at all in doubt."

But as Parliament is supreme, it is open to Parliament to legislate in such a way that an offence may be created of which someone may be found guilty though mens rea is lacking. There may be cases in which, as CHANNELL, J., said in *Pearks, Gunston & Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairies Co., Ltd.* (4):

"... the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any mens rea or not and whether or not he intended to commit a breach of the law."

Thus in diverse situations and circumstances and for any one of a variety of reasons Parliament may see fit to create offences and make people responsible before criminal courts although there is an absence of mens rea. But I would again quote with appreciation (as I did in *Warner v. Metropolitan Police Comr.* (5)) the words of LORD GODDARD, C.J., in *Brend v. Wood* (6), when he said:

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

The intention of Parliament is expressed in the words of an enactment. The words must be looked at in order to see whether either expressly or by necessary implication they displace the general rule or presumption that mens rea is a necessary prerequisite before guilt of an offence can be found. Particular words in a statute must be considered in their setting in the statute and having regard

(1) 59 J.P. 440; [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

(2) 61 J.P. 374; [1897] 1 Q.B. 772.

(3) [1963] 1 All E.R. 223; [1963] A.C. 160.

(4) 66 J.P. 774; [1900-03] All E.R. Rep. 228; [1902] 2 K.B. 1.

(5) 132 J.P. 378; [1968] 2 All E.R. 356.

(6) (1946) 110 J.P. 317.

to all the provisions of the statute and to its declared or obvious purpose. In 1848, in *A.-G. v. Lockwood* (1) ALDERSON, B., said:

"The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity."

It must be considered, therefore, whether by the words of a penal statute it is either express or implied that there may be a conviction without mens rea or, in other words, whether what is called an absolute offence is created.

In *Dyke v. Elliott, The Gauntlet* (2) it was said:

"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

The enquiry must be made, therefore, whether Parliament has used words which expressly enact or impliedly involve that an absolute offence is created. Though sometimes help in construction is derived from noting the presence or the absence of the word "knowingly", no conclusive test can be laid down as a guide in finding the fair, reasonable and common-sense meaning of the language. But in considering whether Parliament has decided to displace what is a general and somewhat fundamental rule, it would not be reasonable lightly to impute to Parliament an intention to create an offence in such a way that someone could be convicted of it who by all reasonable and sensible standards is without fault.

There have been many cases in recent periods in which, in reference to a variety of different statutory enactments, questions have been raised whether absolute offences have been created. Some of these cases illustrate the difficulties that are created if Parliament uses language or phrases as to the meaning of which legitimate differences of opinion can arise. I do not propose to recite or survey these cases because, in my view, the principles which should guide construction are clear and, save to the extent that principles are laid down, the cases merely possess the interest which is yielded by seeing how different questions have, whether correctly or incorrectly, been decided in reference to varying sets of words in various different statutes.

The question must always be—what has Parliament enacted? That is the question in the present case and to that I now turn. The wording of s. 5 of the Dangerous Drugs Act, 1965, is as follows:

(1) (1842), 9 M. & W. 378; *affd.*, 10 M. & W. 464.

(2) (1872), L.R. 4 P.C. 184.

"If a person—(a) being the occupier of any premises, permits those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin (whether by sale or otherwise); or (b) is concerned in the management of any premises used for any such purpose as aforesaid; he shall be guilty of an offence against this Act."

The words are nearly the same as and presumably were devised from words in s. 5 of the Dangerous Drugs Act, 1920, concerning opium. In the present case, the appellant was charged with being concerned in the management of certain premises situate at Fries Farm which were used for the purpose of smoking cannabis or cannabis resin. I need not recite the facts which are set out in the Case Stated. It was for the prosecution to prove the guilt of the appellant. It was found by the magistrates that the appellant had no knowledge whatsoever that cannabis had been smoked in the house. The prosecution contended that guilt can be established of the offence created by s. 5 (b), if a person is concerned in the management of premises in which cannabis is in fact smoked. The consequence was acknowledged, and, indeed, asserted, that, if some persons managed a hostel containing say 50 to 100 rooms, and if on one day, in one room, an occupant smoked one cannabis cigarette without the knowledge of the persons managing, they would have no defence to a charge under s. 5 (b). If Parliament has so enacted, then the law must be enforced. But I am sure that that is not what Parliament has decreed.

If someone is concerned in management, there must at least be knowledge of what it is that is being managed, otherwise there could be no concern in it. If someone is concerned in the management of a building containing a number of separately let residential flats, the concern in such case would be in the arrangements for the lettings and in the arrangements relating to lifts or staircases or the structure of the building as a whole. The concern would be in the management of premises used for residential purposes. In the ordinary course of things the landlord or the manager would have no right of entry into a flat and would have no concern with any normal reasonable and lawful activity within a flat. If a tenant, who was a non-smoker, had a guest one day who smoked a pipe of tobacco in the flat, it would be a strained and unnatural use of language to describe the flat which the tenant rented as being premises used for the purpose of smoking. It would be equally strained and unnatural to describe the landlord or his agent as being concerned in the management of premises used for the purpose of smoking. If, on an isolated occasion, a tenant gave a showing of some cinematograph films to his friends, it would be unreasonable to describe the manager of the flats (who had no occasion to know of the film showing) as being one who was concerned in the management of premises used for the purpose of exhibiting films. If a tenant took sugar with his tea, it would be fanciful to describe the flat as premises used for the purpose of putting sugar into tea.

It seems to me, therefore, that the words "premises . . . used for the purpose of smoking cannabis" are not happily chosen if they were intended to denote premises in which at any time cannabis is smoked. In my opinion, the words "premises used for any such purpose . . ." denote a purpose which is other than quite incidental or casual or fortuitous; they denote a purpose which is or has become either a significant one or a recognised one though certainly not necessarily an only one. There is no difficulty in appreciating what is meant if it is said that premises are used for the purposes of a dance hall or a billiard hall or a bowling alley or a hairdressing saloon or a café. A new or additional use might, however, arise. It might happen that a house let as a private dwelling

might come to be used as a brothel or for the purposes of prostitution. A room let for private occupation might come to be the resort of a number of people who wished to smoke opium so that the time would come when the room could rationally be described as a room used for the purpose of smoking opium.

The words "concerned in the management of any premises used for any such purpose" are, in my view, to be considered together and as one phrase. Even so, the phrase may be capable of two meanings. It could denote the management of premises used for a certain purpose in the sense that the management is limited to management in respect of the premises themselves. It could denote the management of premises used for a certain purpose in the sense that the management was concerned either additionally or perhaps separately with the purpose for which the premises were used. Thus, if someone is said to be concerned in the management of premises used for the purpose of dancing, he could be someone concerned only in the management of the premises themselves, or he could be someone who additionally or possibly separately was concerned with the dancing. On either approach and with an ordinary use of words, it would seem to me that the person would be one who would have and would need to have knowledge of the use of the premises for the particular purpose.

It is said that the intention of Parliament was to impose a duty on all persons concerned in the management of any premises to exercise vigilance to prevent the smoking of cannabis. If that had been the intention of Parliament different words would have been used. It would be possible for Parliament to enact, though it would be surprising if it did, that, if anyone should at any time smoke cannabis on any premises, then all those concerned in the management of those premises, whether they knew of the smoking or not, should automatically be guilty of a criminal offence. Yet this is, in effect, what it is now said that Parliament has enacted. The implications are astonishing. Parliament would not only be indirectly imposing a duty on persons concerned in the management of any premises requiring them to exercise complete supervision over all persons who enter the premises to ensure that no one of them should smoke cannabis, but Parliament would be enacting that the persons concerned in the management would become guilty of an offence if, unknown to them, someone by surreptitiously smoking cannabis eluded the most elaborately devised measures of supervision. There would not be guilt by reason of anything done nor even by reasons of any carelessness, but by reason of the unknown act of some unknown person whom it had not been found possible to control. When the range of possible punishments is remembered the unlikelihood that Parliament intended to legislate in such way becomes additionally apparent.

For the reasons that I have indicated, I consider that, on a fair reading of the phrase "concerned in the management of any premises used for any such purpose", a link is denoted between management and user for a purpose. To say that someone is concerned in the management of premises used for the purpose of smoking cannabis involves, in my view, that his management is with knowledge that the premises are so used. The wording of s. 5 (b) contains positive indications that *mens rea* is an essential ingredient of an offence. Even if, contrary to my view, it is not affirmatively enacted that there must be *mens rea* I cannot read the wording as enacting that there need not be *mens rea*. I find it wholly impossible to say that the statute has either clearly, or by necessary implication, ruled out *mens rea* as a constituent part of guilt.

On the findings of the magistrates it follows that the appellant was not guilty. I would, therefore, allow the appeal. Accordingly, in my view, the case should be remitted to the Divisional Court with a direction to quash the conviction.

LORD PEARCE: The respondent contends that any person who is concerned in the management of premises where cannabis is in fact smoked, even once, is liable, though he had no knowledge and no guilty mind. This is, he argues, a practical Act intended to prevent a practical evil. Only by convicting some innocents along with the guilty can sufficient pressure be put on those who make their living by being concerned in the management of premises. Only thus can they be made alert to prevent cannabis being smoked there. And if the prosecution have to prove knowledge or *mens rea*, many prosecutions will fail and many of the guilty will escape. I find that argument wholly unacceptable. The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law. And at common law *mens rea* is a necessary element in a crime. Since the industrial revolution the increasing complexity of life called into being new duties and crimes which took no account of intent. Those who undertake various industrial and other activities especially where these affect the life and health of the citizen may find themselves liable to statutory punishment regardless of knowledge or intent both in respect of their own acts or neglect and those of their servants. But one must remember that, normally, *mens rea* is still an ingredient of any offence. Before the court will dispense with the necessity for *mens rea* it has to be satisfied that Parliament so intended. The mere absence of the word "knowingly" is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge.

Viewing the matter on these principles, it is not possible to accept the respondent's contention. Even granted that this was in the public health class of case, such as, for instance, are offences created to ensure that food shall be clean, it would be quite unreasonable. It is one thing to make a man absolutely responsible for all his own acts and even vicariously liable for his servants if he engages in a certain type of activity. But it is quite another matter to make him liable for persons over whom he has no control. The innocent hotel-keeper, the lady who keeps lodgings or takes paying guests, the manager of a cinema, the warden of a hostel, the matron of a hospital, the housemaster and matron of a boarding school, all these, it is conceded, are on the respondent's argument liable to conviction the moment that irresponsible occupants smoke cannabis cigarettes. And for what purpose is this harsh imposition laid on their backs? No vigilance by night or day can make them safe. The most that vigilance can attain is advance knowledge of their own guilt. If a smell of cannabis comes from a sitting-room, they know that they have committed the offence. Should they then go at once to the police and confess their guilt in the hope that they will not be prosecuted? They may think it easier to conceal the matter in the hope that it may never be found out. For if, though morally innocent, they are prosecuted, they may lose their livelihood, since thereafter, even though not punished, they are objects of suspicion. I see no real, useful object achieved by such hardship to the innocent. And so wide a possibility of injustice to the innocent could not be justified by any benefit achieved in the deterrent and punishment of the guilty. If, therefore, the words creating the offence are as wide in their application as the respondent contends, Parliament cannot have intended an offence to which absence of knowledge or *mens rea* is no defence.

Parliament might, of course, have taken what was conceded in argument to be a fair and sensible course. It could have said, in appropriate words, that a person is to be liable unless he proves that he had no knowledge or guilty mind.

Admittedly, if the prosecution have to prove a defendant's knowledge beyond reasonable doubt, it may be easy for the guilty to escape. But it would be very much harder for the guilty to escape if the burden of disproving mens rea or knowledge is thrown on the defendant. And if that were done, innocent people could satisfy a jury of their innocence on a balance of probabilities. It has been said that a jury might be confused by the different nature of the onus of satisfying "beyond reasonable doubt" which the prosecution have to discharge and the onus "on a balance of probabilities" which lies on a defendant in proving that he had no knowledge or guilt. I do not believe that this would be so in this kind of case. Most people can easily understand rules that express in greater detail that which their own hearts and minds already feel to be fair and sensible. What they find hard to understand is rules that go "against the grain" of their own common sense. If a judge on a drug case, feeling disheartened, perhaps, after a close study of *Warner v. Metropolitan Police Comr.* (1), had given the jury no direction as to the law, and had simply said that they must consider the facts and do their best with the charge, I believe that they would evolve their duty in some such form as this. "First, I suppose, we must make sure that there really was drug smoking on the premises" (or "that he really had drugs on him" or whatever the charge may be) "and then it is up to the defendant to persuade us that he did not know, or was not guilty for some other good reason". If I am right in this surmise, any judicial elaboration of their own instinctive reactions would be quite easy for them to understand. If it were possible in some so-called absolute offences to take this sensible half-way house, I think that the courts should do so. This has been referred to in *Warner's* case (1). I see no difficulty in it apart from the opinion of LORD SANKEY, L.C., in *Woolmington v. Director of Public Prosecutions* (2). But so long as the full width of that opinion is maintained, I see difficulty. There are many cases where the width of that opinion has caused awkward problems. But before reducing that width, your Lordships would obviously have to consider all the aspects of so far-reaching a problem. In the present case, counsel for the appellant was wisely loth to involve herself in this when she had easier and surer paths to pursue.

The Australian High Court, founding on CAVE, J., and WILLS, J., in *R. v. Tolson* (3), have evolved a defence of reasonable mistake of fact and the burden of proving this on a balance of probabilities rests on the defendant. The whole matter is discussed in an interesting article by PROFESSOR HOWARD in the LAW QUARTERLY REVIEW (vol. 76, p. 547). He concludes:

"When a statutory prohibition is cast in terms which at first sight appear to impose strict responsibility, they should be understood merely as imposing responsibility for negligence but emphasising that the burden of rebutting negligence by affirmative proof of reasonable mistake rests upon the defendant. (*Maher v. Musson* (4), per DIXON, J., and per EVATT and McTIERNAN, JJ., cf. *Sherras v. De Rutzen* (5), per DAY, J.)."

That decision was before *Woolmington's* case (2). In *Thomas v. Regem* (6), the matter was further discussed, but I see no reference to *Woolmington's* case. I should be happy to be persuaded either that it does not prevent us from adopting such a satisfactory concept as the Australian courts have evolved

(1) 132 J.P. 378; [1968] 2 All E.R. 356.

(2) [1935] All E.R. Rep. 1; [1935] A.C. 462.

(3) 54 J.P. 4, 20; [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168.

(4) (1934), 52 C.L.R. 100.

(5) 59 J.P. 440; [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

(6) (1937), 59 C.L.R. 279.

or that its wide effect should be limited. But it has not been necessary for the purposes of the present case to go fully into that aspect of the matter.

Although s. 5 (b) of the Dangerous Drugs Act, 1965, cannot constitute an absolute offence in the wide application for which the respondent contends, it does not follow that, on a narrower construction, it may not constitute an absolute offence. By the term "absolute" I mean an offence to which the normal assumption of mens rea does not apply, but in which the actual words of the offence (without any additional implication of mens rea) may well import some degree of knowledge, e.g., the word "possession" as in *Warner's* case (1). In saying that the section relating to possession (which was there under discussion) was absolute, I was using it (as the context was intended to show) in that loose and convenient sense which had been used in the argument.

The history of s. 5 (b) and the words themselves lend strong support to the view that a narrow meaning was intended. In the Dangerous Drugs Act, 1920, s. 5 (c) and (d), identical words are used save that the "purpose" there was "the preparation of opium for smoking or the sale or smoking of prepared opium" instead of "the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin (whether by sale or otherwise)". Section 5 of the Act of 1920 was in fact re-enacted in s. 8 of the Act of 1965 now under consideration. The words thus taken from the Act of 1920 cannot have a different sense when used in the Act of 1965, especially when they are re-enacted in another part of the Act of 1965 itself. Any guide provided by their context in 1920 can, therefore, be useful in deciding their meaning in 1965, when applied to cannabis smoking. The respondent points out that opium smoking needs more paraphernalia and preparation (in what are sometimes called "opium dens") and that considerations applicable to them are out of place in dealing with cannabis which may be smoked casually and without preparation. Anyone may carry a cannabis cigarette and light it in normal places and in normal circumstances of life. But that very fact makes it the more unlikely that responsibility for such casual acts of invitees or licensees should fall on those who manage premises unless they are managing them for just such a purpose. The whole context and content of the original s. 5 of the Act of 1920 shows that it was considering premises one of whose "purposes" was opium smoking. The "purpose" there referred to is thus the purpose of the management or a purpose known to or acquiesced in by them. I think that the words which were lifted from that section and enacted in relation to cannabis in s. 5 of the Dangerous Drugs Act, 1965, must be given a similar narrow construction. There was no need to insert the word "purpose" if all that was intended was premises where cannabis is in fact smoked. Being concerned in the management of premises used for the purpose of smoking cannabis necessarily imports some knowledge of the use of the premises for the purpose. Admittedly the appellant had no knowledge.

I appreciate that this limitation will, as the respondent contends, rob s. 5 (b) of the Act of 1965 of much of its force. If a wider application or efficiency were desired, it could be achieved by a change of onus and a consideration of what exactly *is* being required of landlords and the like. They cannot reasonably be branded with guilt whenever there happens to be on their premises someone who without their knowledge or assent smokes cannabis. I would allow the appeal.

LORD WILBERFORCE: In my opinion, the appellant, who was found to have "no knowledge whatever that [her] house was being used for the purpose of smoking cannabis" ought not have been convicted. Her conviction was based

(1) 132 J.P. 378; [1968] 2 All E.R. 356.

on s. 5 (b) of the Dangerous Drugs Act, 1965, and on an interpretation of the words "concerned in the management of any premises used for [the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin]" which makes a person liable to prosecution who lets, or licenses the occupation, of premises on which cannabis or cannabis resin is smoked or dealt in. It requires no amplification to show how wide a category of persons would thus be brought into the category of potential offenders. So, for this appeal, the essential question is to determine whether this interpretation is correct.

The words "concerned in the management" are not, on the face of them, very clear, but at least they suggest some technical or acquired meaning, some meaning other than one which refers merely to such common transactions as letting or licensing the occupation of premises. For if it had been intended to penalise anyone who lets or licenses premises on which cannabis comes to be smoked, it would have been easy to do so in simple language. This impression is strengthened when the following words of the paragraph are read. They reflect what I would think to be logically correct, namely, that one does not "manage" premises the inert subject of a conveyance or a lease, but rather some human activity on the premises which the manager has an interest in directing. And so, when the paragraph speaks of management of premises, and for a purpose, I would expect the purpose for which the premises are used to be that of the manager, otherwise, what would be the nature and object of the management?

A consideration of previous and analogous legislation removes any doubt that these words are intended to refer to such a special and limited class as I have described, one which quite clearly excludes such persons as the appellant. This legislation deals with other "anti-social" activities such as the keeping of brothels, opium "dens" and gaming houses.

1. The Criminal Law Amendment Act 1885, s. 13, dealt with the keeping of brothels. It penalised a person who "keeps or manages or acts or assists in the management of a brothel". It dealt also with persons, other than managers, tenants, occupiers, lessors and (by an amendment in the Criminal Law Amendment Act, 1912) persons in charge, but in relation to them it stated explicitly the requirement of knowledge—"knowingly permits", "lets . . . with . . . knowledge", "is wilfully a party to the continued use". These fit in with and emphasise the conception of purposeful management. Substantially similar language is taken into the modern Sexual Offences Act, 1956, which refers to managing or acting or assisting in management. It is perhaps worth observation that this Act refers both to "used as a brothel" and "used for the purposes of habitual prostitution", showing that when a convenient noun exists which includes the concept of a prohibited purpose, it is adopted, and that "used for the purposes" is employed to denote a similar type of situation as to which no convenient noun can be found or coined.

2. The Dangerous Drugs Act, 1920, dealt with opium. The relevant sections are reproduced in the Act of 1965 (s. 8), and it is obvious that the provisions regarding cannabis are based on them. In dealing with management of premises it seems clear enough that what is in mind is not the lessor of premises on which opium may come to be smoked, but a manager of what, if a noun is required, might be called "opium dens". No doubt opium smoking is a more elaborate and prolonged process than smoking of cannabis, so that the transference of legislation from one activity to the other is not completely appropriate, but the difference (perhaps not understood by the draftsman) is not sufficient to impel us to a fresh conception of management.



3. The use of the word "management" in relation to gaming houses goes back at least to the Gaming Act, 1845 (s. 4). The expression "concerned in the management" is used in s. 5. The Betting Act, 1853 (s. 3), combines prohibition of "permitting" by occupiers with prohibition of management of a house or place used for the purposes of betting, a comparable structure to that of s. 5 of the Dangerous Drugs Act, 1965. I need not trace this wording through the mountains of later enactments.

I am left with no doubt after examination of this legislation that, when the Dangerous Drugs Act, 1964 (the predecessor of that of 1965) adopted, in relation to cannabis, language which penalised on the one hand "permits . . . to be used" and on the other hand being "concerned in the management of any premises used for any such purpose . . .", it must, in the latter provision, have had in mind the same kind of purposeful management activity as was referred to, in analogous connections, in previous legislation. One can describe what is penalised as being concerned in the management of a cannabis shop, or a cannabis smoking den or parlour, a type of activity which no doubt includes not only one where this was the direct or main purpose of the manager, or person concerned in the management, but also cases where, by extension or infiltration and acquiescence, this purpose had come to be included in the purposes for which the premises are being managed or, one might say, run. If this is the correct meaning to extract from the language, when one considers that there is also a wide area of penalisation elsewhere of possession and of permitting by occupiers, there is a rational statutory scheme of considerable scope. I see no reason to strain the language of s. 5 (b) so as to convert it into, in effect, an instrument of amateur law enforcement which may catch many innocent persons—whether the section, as so interpreted, is too severe or not severe enough, is something for Parliament to consider.

On this admittedly prosaic interpretation of the paragraph, I do not embark on a wider examination of the problem of absolute offences, or of guilty intention. As in *Warner v. Metropolitan Police Comr.* (1), the word "possession" carried its own content of mental intention so, perhaps a fortiori, do the words "concerned in the management of any premises used for any such purpose . . .", and there is no occasion to look beyond them for some separate ingredient which might, in fact, be difficult to define. I would allow the appeal.

LORD DIPLOCK: On premises of which the appellant was the occupier but from which she was frequently absent cannabis was smoked without her permission or knowledge. She was charged before the Woodstock magistrates with an offence under s. 5 of the Dangerous Drugs Act, 1965. She was not charged under para. (a) as an occupier of premises who "permits those premises to be used for the purpose of smoking cannabis" but under para. (b) as a person "concerned in the management of . . . premises used for any such purpose". She was convicted and fined £25. That conviction was upheld by the Divisional Court who gave leave to appeal to your Lordships' House and certified that the following points of law of general public importance were involved in their decision, viz.:

"(i) Whether s. 5 (b) of the Dangerous Drugs Act, 1965, creates an absolute offence. (ii) What, if any, mental element is involved in the offence. And (since leave to appeal is given in regard to (i) and (ii) above) (iii) whether on the facts found a reasonable Bench of magistrates, properly directing their minds as to the law, could have convicted the appellant."

The expression "absolute offence" used in the first question is an imprecise phrase currently used to describe an act for which the doer is subject to criminal sanctions, even though when he did it he had no mens rea; but mens rea itself also lacks precision and calls for closer analysis than is involved in its mere translation into English by WRIGHT, J., in *Sherras v. De Rutzen* (1) as "evil intention, or a knowledge of the wrongfulness of the act"—a definition which suggests a single mental element common to all criminal offences and appears to omit thoughtlessness which, at any rate if it amounted to a reckless disregard of the nature or consequences of an act, was a sufficient mental element in some offences at common law. A more helpful exposition of the nature of mens rea in both common law and statutory offences is to be found in the judgment of STEPHEN, J., in *R. v. Tolson* (2):

"The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined has not been committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

Where the crime consists of doing an act which is prohibited by statute, the proposition as to the state of mind of the doer which is contained in the full definition of the crime must be ascertained from the words and subject-matter of the statute. The proposition, as STEPHEN, J., pointed out, may be stated explicitly by the use of such qualifying adverbs as "maliciously", "fraudulently", "negligently" or "knowingly"—expressions which in relation to different kinds of conduct may call for judicial exegesis. And even without such adverbs the words descriptive of the prohibited act may themselves connote the presence of a particular mental element. Thus, where the prohibited conduct consists in permitting a particular thing to be done the word "permit" connotes at least knowledge or reasonable grounds for suspicion on the part of the permittor that the thing will be done and an unwillingness to use means available to him to prevent it, and, to take a recent example, to have in one's "possession" a prohibited substance connotes some degree of awareness of that which was within the possessor's physical control (*Warner v. Metropolitan Police Comr.* (3)).

But only too frequently the actual words used by Parliament to define the prohibited conduct are in themselves descriptive only of a physical act and bear no connotation as to any particular state of mind on the part of the person who does the act. Nevertheless, the mere fact that Parliament has made the conduct a criminal offence gives rise to some implication about the mental element of the conduct proscribed. It has, for instance, never been doubted since *M'Naghten's Case* (4) that one implication as to the mental element in any statutory offence is that the doer of the prohibited act should be sane within the *M'Naghten* rules; yet this part of the full definition of the offence is invariably left unexpressed by Parliament. STEPHEN, J., in *R. v. Tolson* (2) suggested other circumstances never expressly dealt with in the statute where a mental element to be implied from the mere fact that the doing of an act was made a criminal offence would be absent, such as where it was done in a state of somnambulism or under duress, to which one might add inevitable accident. But the importance of the actual decision of the nine judges who constituted the majority in *R. v. Tolson* which

(1) 59 J.P. 440; [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

(2) 54 J.P. 4, 20; [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168.

(3) 132 J.P. 378; [1968] 2 All E.R. 356.

(4) (1843), [1843-60] All E.R. Rep. 229; 10 Cl. & Fin. 200.

concerned a charge of bigamy under s. 57 of the Offences Against the Person Act, 1861, was that it laid down as a general principle of construction of any enactment which creates a criminal offence that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element, they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief held honestly and on reasonable grounds in the existence of facts which, if true, would make the act innocent. As was said by the Privy Council in *Bank of New South Wales v. Piper* (1), the absence of mens rea really consists in such a belief by the accused.

This implication stems from the principle that it is contrary to a rational and civilised criminal code, such as Parliament must be presumed to have intended, to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law (*ignorantia juris non excusat*) and has taken all proper care to inform himself of any facts which would make his conduct lawful. Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety, or morals, in which citizens have a choice whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods, or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v. Reginam* (2)).

The numerous decisions in the English courts since *R. v. Tolson* (3) in which this later inference has been drawn rightly, or, as I think, often wrongly, are not easy to reconcile with others where the court has failed to draw the inference, nor are they always limited to penal provisions designed to regulate the conduct of persons who choose to participate in a particular activity as distinct from those of general application to the conduct of ordinary citizens in the course of their everyday life. It may well be that, had the significance of *R. v. Tolson* been appreciated here, as it was in the High Court of Australia, our courts, too, would have been less ready to infer an intention of Parliament to create offences for which honest and reasonable mistake was no excuse. Its importance as a guide to the construction of penal provisions in statutes of general application was recognised by Dixon, J., in *Maher v. Musson* (4), and by the majority of the High Court of Australia in *Thomas v. Regem* (5). It is now regularly adopted in Australia as a general principle of construction of statutory provisions of this kind.

(1) 61 J.P. 660; [1897] A.C. 383.

(2) [1963] 1 All E.R. 223; [1963] A.C. 160.

(3) 54 J.P. 4, 20; [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168.

(4) (1934), 52 C.L.R. 100.

(5) (1937), 59 C.L.R. 279.

By contrast, in England the principle laid down in *R. v. Tolson* (1) has been overlooked until recently (see *R. v. Gould* (2)) partly because the ratio decidendi was misunderstood by the Court of Criminal Appeal in *R. v. Wheat*, *R. v. Stocks* (3), and partly, I suspect, because the reference in *R. v. Tolson* to the mistaken belief as being a "defence" to the charge of bigamy was thought to run counter to the decision of your Lordships' House in *Woolmington v. Director of Public Prosecutions* (4). That expression might have to be expanded in the light of what was said in *Woolmington's* case, though I doubt whether a jury would find the expansion much more informative than describing the existence of the mistaken belief as a defence to which they should give effect unless they felt sure either that the accused did not honestly hold it or, if he did, that he had no reasonable grounds for doing so.

Woolmington's case (4) affirmed the principle that the onus lies on the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged. It does not purport to lay down how that onus can be discharged as respects any particular elements of the offence. This, under our system of criminal procedure, is left to the common sense of the jury. *Woolmington's* case did not decide anything so irrational as that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny. The jury is entitled to presume that the accused acted with knowledge of the facts unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief if mistaken was held. What *Woolmington's* case did decide is that where there is any such evidence the jury, after considering it and also any relevant evidence called by the prosecution on the issue of the existence of the alleged mistaken belief, should acquit the accused unless they feel sure that he did not hold the belief or that there were no reasonable grounds on which he could have done so. This, as I understand it, is the approach of DIXON, J., to the onus of proof of honest and reasonable mistaken belief as he expressed it in *Proudman v. Dayman* (5). Unlike the position where a statute expressly places the onus of proving lack of guilty knowledge on the accused, the accused does not have to prove the existence of mistaken belief on the balance of probabilities; he has to raise a reasonable doubt as to its non-existence.

It has been objected that the requirement laid down in *R. v. Tolson* (1) and the *Bank of New South Wales v. Piper* (6) that the mistaken belief should be based on reasonable grounds introduces an objective mental element into mens rea. This may be so, but there is nothing novel in this. The test of the mental element of provocation which distinguishes manslaughter from murder has always been at common law and now is by statute the objective one of the way in which a reasonable man would react to provocation. There is nothing unreasonable in requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act.

It is, then, with these principles in mind that I approach the construction of s. 5 of the Dangerous Drugs Act, 1965, under which the appellant was charged.

(1) 54 J.P. 4, 20; [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168.

(2) 132 J.P. 209; [1968] 1 All E.R. 849; [1968] 2 Q.B. 65.

(3) 85 J.P. 203; [1921] All E.R. Rep. 602; [1921] 2 K.B. 119.

(4) [1935] All E.R. Rep. 1; [1935] A.C. 462.

(5) (1941), 67 C.L.R. 536.

(6) 61 J.P. 660; [1897] A.C. 383.

It contains separate prohibitions in para. (a) and para. (b), respectively. The offence under para. (a), with which the appellant was not charged, can only be committed by the occupier of premises. The act of the occupier which is prohibited is to "permit" those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin. Here the word "permits" used to define the prohibited act in itself connotes as a mental element of the prohibited conduct knowledge or grounds for reasonable suspicion on the part of the occupier that the premises will be used by someone for that purpose and an unwillingness on his part to take means available to him to prevent it. As regards this offence there is no need to have recourse to the more general implication as to the need for mens rea where the words are in themselves descriptive only of a physical act.

In para. (b) the phrase "concerned in the management of any premises", unlike the phrase "being the occupier of any premises" in para. (a), is not descriptive of a class of person to whom a particular kind of conduct subsequently defined is prohibited. It is part of the definition of the offence itself. The conduct prohibited is to be "concerned in the management of any premises used for the purpose of smoking cannabis", etc. What, if any, mental element does this compound phrase connote? The premises of which it is an offence to be concerned in the management are defined not by reference merely to what happens on them (e.g., "premises on which cannabis is smoked") but by the purpose for which they are used. "Purpose" connotes an intention by some person to achieve a result desired by him. Whose purpose must it be that the premises should be used for smoking cannabis? The answer is, in my opinion, to be found in the words "is concerned in the management". To manage or to be concerned in the management itself connotes control or direction of an activity to achieve a result desired by those who control or direct the activity. In my opinion, in the compound phrase "is concerned in the management of premises used for the purpose of smoking cannabis", etc., the purpose described must be the purpose of the person concerned in the management of the premises. But at its highest against the appellant, the words of the paragraph are ambiguous as to whose is the relevant purpose. That ambiguity in a penal statute which, on the alternative construction that it would be sufficient if the purpose to use the premises for smoking cannabis were that of anyone who in fact smoked cannabis, would render her liable, despite lack of any knowledge or acquiescence on her part, should be unhesitatingly resolved in her favour.

In view of the finding that the appellant "had no knowledge whatever that the house was being used for the purpose of smoking cannabis or cannabis resin", she could not properly be convicted of the offence charged. I, too, would allow this appeal.

Appeal allowed.

Solicitors: *B. M. Birnberg & Co.; Preston, Rose & Neil, for Cole & Cole, Oxford.*

G.F.L.B.

COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, M.R., DAVIES AND WINN, L.JJ.)

October 28, 29, 30, 31, December 10, 1968

KINGSWAY INVESTMENTS (KENT), LTD. AND ANOTHER *v.* KENT COUNTY COUNCIL.

Town and Country Planning—Permission—Conditional grant—Permission to have effect at end of specified period unless within that time approval of particulars relating to proposed building signified to applicant—Town and Country Planning Act, 1947 (10 & 11 Geo. 5, c. 51), s. 14 (1), (2).

By s. 14 of the Town and Country Planning Act, 1947 [see now ss. 17 and 18 of the Town and Country Planning Act, 1962]: "(1) . . . where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit . . . (2) Without prejudice to the generality of the foregoing subsection conditions may be imposed on the grant of permission to develop land thereunder—(a) for regulating the development or use of land under the control of the applicant . . . or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the expiration of a specified period, and the carrying out of any works required for the reinstatement of land at the expiration of that period . . ."

A local planning authority granted outline planning permission to the plaintiffs subject to the conditions: (i) "The subsequent submission and approval of details relating to (a) siting, height, design, and/or external appearance of the building, (b) means of access. (ii) The permission ceasing to have effect after the expiration of three years from the date of issue unless within that time approval has been signified to those matters reserved under condition (i) above."

HELD, per DAVIES, L.J.: a condition requiring the submission of details of the proposed development within a prescribed time might be a valid condition, but under condition (ii) the planning permission might lapse without any default on the part of the plaintiffs and so that condition was unreasonable and bad; per WINN, L.J., a planning authority was not empowered by s. 14 (1) to impose any time limit on the validity of a planning permission except for the purposes specified in s. 14 (2), and so the condition sought to be impugned was repugnant to the Act and to the permission to which it was attached; but the invalid condition was severable from the rest of the permission (per DAVIES, L.J.) as (though it might have been administratively convenient to the planning authority) it did not relate and was unimportant to the actual development, and (per WINN, L.J.) the condition, being void and of no effect, could have no force in relation to the permission itself; therefore, the outline permission, validly granted, still subsisted.

APPEALS by the plaintiff company, Kingsway Investments (Kent), Ltd., and the plaintiff, Allan Kenworthy, from a decision of LYELL, J., reported 132 J.P. 543.

Frank, Q.C., and P. Freeman for the plaintiffs.

Widdicombe, Q.C., and E. A. Vaughan-Neil for the county council.

Cur. adv. vult.

Dec. 10, 1968. The following judgments were read.

LORD DENNING, M.R.: In these cases we are concerned with outline planning permissions which were granted by the defendants, Kent County Council, in 1952, 16 years ago. In all their outline permissions the defendants have for years inserted a condition by which the permissions would expire after the end of three years, unless within that time detailed plans had been submitted to and approved by them. In these cases no such plans were submitted and approved within

the three years. So the defendants thought that the permissions were dead; and that they had expired by effluxion of time. But the developers now claim that the condition (about expiry at the end of three years) was bad. They say that they can ignore it; and that they are now entitled to build on the land in accordance with the original outline permission, subject only to the submission of details. They say that the only alternative open to the defendants is formally to revoke the original permissions; in which case the developers will be entitled to compensation for loss of the permissions. It is said that the compensation may run into a million pounds.

The cases are then of great consequence to many; but they depend on this: Was it within the power of the defendants to impose this time limit of three years, or indeed any time limit? The developers say that they had no power to impose any time limit for the submission and approval of plans. Even 20 years would have been bad.

The plaintiff Kenworthy's case

Teston is a small village set in very attractive countryside about $4\frac{1}{2}$ miles from Maidstone. The plaintiff lives in the village. In 1952 he bought a part of the garden of Teston House. It was about one acre. He thought of building a house on it for himself. In November 1952, he applied for outline planning permission to erect one house on the site. He filled in an application form on a printed form which was issued by the defendants. A note on it said:

"If the [plaintiff] so desires he may, in the case of an application for permission to erect buildings, submit in the first instance an application expressed to be an *outline* application. Any such application will be considered as one for approval in principle to the erection of the buildings specified subject to the subsequent submission to, and approval by, the local planning authority of *details* such as the siting, design and external appearance of the buildings, the means of access, etc. *The local planning authority's approval in principle would be subject to the submission of the further details within three years.*"

On Jan. 8, 1953, the defendants notified the plaintiff of grant of permission to develop land subject to conditions. The document is of much importance in the case, so I set it out in full:

"TAKE NOTICE that the MAIDSTONE DISTRICT COUNCIL, in exercise of its powers delegated by the [defendants], the local planning authority under the Town and Country Planning Act 1947, HAS GRANTED PERMISSION for development of land situate at Tonbridge Road, Teston, and being outline application for [developing]... SUBJECT TO THE CONDITIONS SPECIFIED hereunder:—

(i) The subsequent submission and approval of details relating to:—
(a) Siting, height, design, and/or external appearance of the building. (b) means of access.

(ii) The permission ceasing to have effect after the expiration of 3 years from the date of issue unless within that time approval has been signified to those matters reserved under condition (i) above.

And that the grounds for the imposition of such conditions are:—(1) Full details have not yet been submitted. (2) In order to prevent the accumulation of permission in respect of which no plans have yet been submitted for approval.

The great question in the case is whether condition (ii) (which imposed a three-year time limit) is good or bad. The plaintiff did not appeal from it at the time.

Nor did he comply with it. After the three years had expired, the permissions apparently lapsed.

On Aug. 11, 1958, the plaintiff applied for permission to erect two houses on the site, with cesspool draining. On Oct. 29, 1958, the application was refused. He did not appeal. On Oct. 2, 1964, the plaintiff applied for permission to erect a detached house and garage on the land. On Jan. 15, 1965, the application was refused. He appealed to the Minister. There was an inquiry. The inspector found that it was outside the "village envelope" for Teston as adopted by the defendants. He was of opinion that the proposed development, if allowed, would constitute an unjustified extension of the village into an attractive rural countryside; and that the use of the proposed access way would increase the risk of accident. On Nov. 22, 1965, the Minister dismissed the appeal. On Mar. 11, 1966, the plaintiff issued a writ seeking a declaration that condition (ii) (which imposed a three-year limit) was void; and that the original planning permission of 8 Jan. 1953, was still in existence. The judge held that the condition was void, but he went on to hold that the invalidity of that condition rendered the whole permission bad. So the plaintiff gained nothing. He appeals to this court.

The Trosley Towers Estate

This case raises the same point as the plaintiff's case. But not in so simple a way. The Trosley Towers Estate is an outstanding area of natural beauty near Wrotham. It runs for two miles along the top of the North Downs and down a steep escarpment to the Pilgrim's Way. It is in all 365 acres. Out of this area, 165 acres are already being developed. A new village is being built there. Those 165 acres lie behind the ridge of the hill and do not obtrude on the view. But the question arises as to the remaining 200 acres. These comprise the crest of the hill and the steep slopes of the escarpment. Thickly wooded at the top, it opens up into grassland near the Pilgrim's Way. The plaintiff company, Kingsway Investments (Kent), Ltd., claim to be entitled to develop these 200 acres for building. The defendants are opposed to its development. They feel it is much against the public interest. But the plaintiff company say that *outline* planning permission was given as long ago as 1952; that it is still valid; and cannot be revoked except by paying them compensation. So the question is whether the 1952 permission is still valid or not. It contains, like the plaintiff's case, a condition imposing a three-year time limit, which has long since expired.

The facts are these. On Mar. 19, 1952, a company called C.A.S. (Industrial Developments), Ltd., wrote to the Strood and the Malling Rural District Councils applying for permission to develop the 365 acres. They filled in printed forms which contained the same notice as in the plaintiff's case.

On Oct. 14, 1952, the defendants granted planning permission for development of the whole 365 acres—

"... in accordance with the particulars supplied with your outline application for permission dated the twenty-fifth day of March 1952 . . . SUBJECT TO THE CONDITIONS specified hereunder:—(i) That details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the local planning authority before any works are begun; (ii) the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above; . . . (iv) that schemes of tree planting shall be submitted to and approved by the local planning authority . . . within the period referred to in condition (ii) above . . . and that the grounds for the imposition of such conditions are:—1. No such details have been submitted; 2. In order to

prevent the accumulation of permissions in respect of which no details have been submitted; ... and 4. In order to preserve the natural amenities of the area."

Successive applications for an extension of the time limit in condition (ii) were agreed up to Sept. 26, 1962, but no extension after that date was agreed.

In May, 1963, permission was granted to Croudace, Ltd., to develop 165 acres of the estate as a new village; and this development is progressing. There has been great controversy about the remaining 200 acres. There have been several public inquiries and both the Minister and the defendants are of opinion that, except for a very small part, the 200 acres ought not to be developed. On Aug. 25, 1965, the Minister, on legal advice, held that the original permission had expired by reason of the time limit.

On Jan. 20, 1966, the plaintiff company brought this action against the defendants claiming a declaration that condition (ii) of the permission was void and a declaration that the permission still subsisted. The judge has held (as in the plaintiff's case) that the condition was void, but that the invalidity of that condition renders the whole permission void. So that the developers took nothing. They appeal to this court.

The power to impose conditions

The Town and Country Planning Act, 1947, gives the planning authority a wide power to impose conditions. Section 14 (1) provides that the—

"... authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

There is nothing in the Act of 1947 itself about *outline permission*. But it is found in the Town and Country Planning General Development Order, 1950, [replaced by the Town and Country Planning General Development Order, 1963] and the Development Charge Application Regulations 1950. By art. 5 (2) an applicant can make an *outline* application without submitting any details. The planning authority can then grant *outline* permission, subject to the subsequent submission and approval of details, "with or without other conditions".

In my opinion, the words of the Act and of the order are wide enough to enable a planning authority to impose conditions limiting the *time* within which the proposed development should take place. It was urged before us that, when Parliament intended to authorise such a condition, it did so expressly as in s. 14 (2) when, in the case of temporary buildings, a condition can be imposed requiring the buildings to be removed at the end of a specified period. I do not accept this argument. Section 14 (2) starts off with the words "without prejudice to the generality of the foregoing". So it is not legitimate to use it so as to limit s. 14 (1). It is more to the point to remember that the planning authority are to have regard "to the provisions of the development plan" which is itself to be reviewed every five years; and altered to meet the changing circumstances of the time: see s. 5, s. 6 and s. 7 of the Act of 1947.

In my opinion a planning authority are entitled to impose a *time limit* within which planning permission must be acted on. It is desirable that they should do so in the interests of the good planning of their area. Take the county of Kent. It is the garden of England. It is in danger of being overgrown. Just as, in a garden, one must prune away the old shoots, so as to make room for the new, so in controlling development in their area, the authority must be able to throw

out the stale permissions so as to make room for fresh ones. We all know what happens in outline applications. A man applies for outline planning permission, just in case he wishes to build in the future; or maybe, to make a profit by selling the land with planning permission. He puts in a sketch outlining the boundaries of the land and saying that he wants to build on it. He need give no details. The planning authority grant the outline permission because it appears to be appropriate in the circumstances then existing. But the applicant may afterwards change his mind. He may not develop for years. Meanwhile circumstances may change. Other people may seek to develop land nearby, which may affect this land. New roads may be made and others closed. One area may be declared a green belt. Another a new town. In this situation, I think a planning authority should be able to say on granting outline permission: "We think it appropriate for you to build a house in the next three years: but we cannot tie our hands if you delay beyond that time."

In my opinion, a condition which imposes a time limit can validly be imposed by a planning authority.

The various types of time limits

The conditions which impose time limits are of several kinds. Each deserves separate consideration.

(i). *A condition which requires details to be submitted within (say) three years: but does not go on to say that they are to be approved within that time.*

On May 11, 1950, the Minister issued a circular (no. 87) to planning authorities, in which he suggested that they should impose such a condition on outline permission. The circular said:

"Moreover a permission granted on an outline application is in every sense the permission required by section 12 of the Act, and it cannot be withdrawn except by formal revocation. It is however suggested that *it would be reasonable, in order to prevent the accumulation of permissions in respect of which no plans have been submitted for approval, to attach a condition to permissions of this type requiring that the plans shall be submitted within a stated period, e.g. three years.*"

Since that time most planning authorities have followed the Minister's suggestion. They have issued forms of application for outline planning permission. On every form there is a note which says that "the local authority's approval in principle would be subject to the submission of the further details within three years". It may safely be assumed that, in most of the counties of England, wherever outline permission is granted, it is subject to a condition "that details as to the reserved matters are to be submitted" within three years, or as the case may be. Such a condition is plainly fair and reasonable. Otherwise the planning authority would be stuck with a lot of stale outline permissions, not knowing whether they would be taken up or not. I hold it is plainly valid.

But an important point arises on such a condition. Suppose the man does submit details within three years, and the planning authority for good reason does not approve them, for instance, because they are quite unsuitable from a planning point of view. Can the man, after the three years have expired, submit other details for approval? Does the time limit disappear by the submission of details that are not approved? If this be correct, it means that a man, by submitting the flimsiest details within three years—a mere pro forma submission—can get rid of the time limit altogether.

I am clearly of opinion that he cannot do this. The condition does not disappear merely by the submission of inadequate details. If it did, it would deprive the

condition of much of its usefulness. The true meaning of the condition is that the man is entitled to submit plan after plan, details after details, within the three years in the hope of getting them approved: but, if none of those is approved, the condition prevents any more being submitted after the three years.

This suggestion (that a pro forma submission of details determines the condition) reminds me of the rule in *Dumpro's Case* (1), when a condition not to assign a lease without licence was held to be determined on the first licence being granted. That rule was disapproved by the profession for centuries (see *Doe d. Boscawen and Towers v. Bliss* (2)) until it was finally overthrown by Parliament. We ought not to resurrect a similar rule now in planning law.

(ii). *A condition which requires the buildings to be begun within (say) three years:*

From the very earliest days of planning a condition as to time for beginning work has been held to be valid. In *Re 42-48 Paddington Street and 62-72 Chiltern Street, St. Marylebone. Marks & Spencer, Ltd. v. London County Council* (3), there was a condition that the work was to be "commenced within six months and completed within eighteen months from Aug. 1, 1938, 'failing which the consent shall become null and void' ". It was submitted that this condition was ultra vires; but the court rejected the submission. HARMAN, J., said:

"... it was argued that the conditions imposed must relate to development and have nothing to do with time. I cannot accept this contention. It seems to me that the question of time may be intimately bound up with the question of planning, and that it cannot be unreasonable or irrelevant that an authority should fix a time limit to any permission they may grant. If it were otherwise, the authority might be embarrassed by permissions long out of date and inappropriate to changed circumstances."

His views on this point were upheld by the Court of Appeal, by SIR RAYMOND EVERSHED, M.R., and by JENKINS, L.J.

In 1960 Parliament clearly recognised the validity of such a condition. By s. 41 (3) of the Caravan Sites and Control of Development Act 1960:

"It is hereby declared that where—(a) permission is granted under Part III of the Act of 1947 for development consisting of or including the carrying out of building or other operations subject to a condition that the operations shall be commenced not later than a time specified in the condition, and (b) any building or other operations are commenced after the time so specified, the commencement and carrying out of those operations do not constitute development for which that permission was granted."

That section did not make new law. It declares the existing law. It shows, as clearly as can be, that a condition, which requires the buildings to be commenced within a specified time, is a valid condition.

(iii). *A condition that the details shall be submitted to and approved by the planning authority within (say) three years:*

It is suggested that such a condition is bad because it involves something to be done which is outside the control of the grantee—namely, the approval of the planning authority. It enables the planning authority, so it is said, indirectly to revoke the permission, without a formal revocation—and is, therefore, repugnant to the Act and is void. An outline permission, it is said, is as good as a detailed

(1) (1603), 4 Co. Rep. 119b.

(2) (1813), 4 Taunt. 735.

(3) [1951] 2 All E.R. 1025; *reversed* C.A., 116 J.P. 286; [1952] 1 All E.R. 1150; [1952] Ch. 549; *affd.*, H.L., 117 J.P. 261; [1953] 1 All E.R. 1095; [1953] A.C. 535.

permission (subject to submission of details)—see *Hamilton v. West Sussex County Council* (1). Once granted, it is granted for ever, unless it is formally revoked, and then on revocation compensation must be paid.

I cannot accept this contention in the least. A time limit is good, even though it involves something outside the developer's control. That is apparent from the fact that a condition is good which requires that the work shall be begun within a specified period. It is elementary that after outline permission is granted, the work cannot *begin* until the details are submitted and the planning authority have *approved* them. So it is necessary then to obtain the *approval* of the planning authority. That is something which is outside the control of the grantee. And yet it is a good condition.

Seeing that a condition as to *beginning* the work in a specified time is good, I think a condition regarding *approval* within a specified time is also good. There is no practical difficulty in applying it. The applicant must make sure to submit his details some little time before the end of the three years—it should be at least two months before the end. The planning authority have to approve or disapprove within two months. So he will get his approval (if his plans are in order) within the required three years.

I notice that in a circular dated Feb. 6, 1968, the Minister stated that:

“A condition requiring the developer to obtain *approval* of detailed plans within a stated period should not be used, since the timing of an approval is not within the developer's control.”

The Minister does not suggest that such a condition is *ultra vires*. He only says it “should not be used”, which is a very different thing. Indeed he has held in two decisions at least that it is *intra vires*. In any case, I do not think this circular should influence our views as to the law. The Minister's criticism of the condition would apply also to a condition that the work should be begun within a stated period; for that involves the *approval* of the planning authority too.

The judge, however, took a point, largely of his own making, on this condition. He said that it made no allowance for an appeal to the Minister. Suppose, he said, that a developer put in the details shortly before the end of the three years; and the local planning authority disapproved them; and the developer then appealed to the Minister (as he is entitled to do within one month); and the Minister allowed the appeal and approved the details—after the three years had expired. What then? The judge thought that the condition would operate so as to nullify the Minister's approval. He held that, on that account, the condition was unreasonable and bad.

I am afraid I cannot agree with the judge on this point. The condition should be construed so as to be valid rather than invalid, *ut res magis valeat quam pereat*. So I should read it that approval is to be given by the local planning authority within three years (if the matter rests with that authority) but, if there is an appeal to the Minister, the time is extended till the Minister gives his decision. In other words, I should read into the condition the words which the judge declined to do: “and such time thereafter as is necessary for the Minister to determine any appeal”. Alternatively, I should be prepared to hold that the Minister, when he gives his decision, should take such steps as are necessary to give effect to his decision. He should allow the applicant to appeal out of time against the strict condition and ask for it to be modified so as to extend the three years pending appeal, see s. 16 (2) of the Act of 1947. But, in one way or another, I am sure that a successful appellant would not be defeated by the condition.

(1) 122 J.P. 294; [1958] 2 All E.R. 174; [1958] 2 Q.B. 286.

It was on that narrow point that the judge held the condition to be invalid. He said:

"It is solely on the ground that no provision has been made to cover the time required for an appeal to the Minister that I hold it to be ultra vires and void."

I differ from the judge on that narrow point, but entirely agree with him on the rest. I hold, therefore, that the condition was valid.

(iv). *The impact of the new Act:*

Since the judge gave his decision, Parliament has passed the Town and Country Planning Act, 1968. It was only passed on Friday 25th October 1968, and we started hearing this appeal on Monday 28th October 1968. I doubt whether we ought to look at it. It would not seem fair that the rights of the parties to this appeal should depend on the chance whether we heard the case just before, or just after, the new Act was passed: see *Ormond Investment Co., Ltd. v. Betts* (1), per LORD BUCKMASTER. In any case many of the sections only come into operation by the Minister's order; and I do not know that he has made an order. But it is comforting to find that s. 66 (3) of the new Act proceeds on the assumption that, on giving outline planning permission, it is legitimate to impose a condition that development should be *begun or completed* within a limited time, or that *application* for approval of details should be made within a specified time.

The new Act says nothing about a condition that the details must be *approved* within a limited time. It does not say such a condition is valid; nor does it condemn it as invalid. In these circumstances I do not think we should be influenced one way or the other by the new Act. The condition must be tried on its merits just as if the new Act had not been passed. And on its merits I think it was within the powers of the planning authority.

(v). *The reasonableness of the period of three years:*

Assuming that the condition was within the powers of the planning authority, I do not think it is rendered invalid by reason of the period allowed being only three years. That is usually a reasonable period, as the building contractors said in a letter of 16th June 1959, to the defendants:

"It is believed that this period [three years] is normally applied by your Council to outline planning consents in order to avoid the accumulation of permissions in respect of which no detailed plans have been submitted. Whereas a 3 year period is no doubt normally quite reasonable and acceptable in that this period is of sufficient duration to permit the preparation *and approval* of detailed plans, we feel sure you will agree that it will be inadequate to cover the comparable work in a scheme of this nature and size."

Suppose that the contractors were right and that in the case of the Trosley Towers Estate the three years was too short, and it ought to have been five or seven years, that would not, I think, render the condition void. The appropriate remedy in that case would be an appeal to the Minister.

(vi). *The reason for imposing the conditions:*

The General Development Order, 1950, requires the planning authority to give the reasons why the condition is imposed. Article 5 (9) provides that:

"... where the local planning authority decide to grant such permission ... subject to conditions or to refuse it, they shall state their reasons in writing, and send with the decision a notification ..."

(1) [1928] All E.R. Rep. 709; [1928] A.C. 143.

That provision is, no doubt, mandatory as the Divisional Court held in *Brayhead (Ascot), Ltd. v. Berkshire County Council* (1). But the question is what is to happen if no reasons are given or no sufficient reasons?

The defendants in the present cases gave a stereotyped reason for condition (ii) in these words:

"2. In order to prevent the accumulation of permissions in respect of which no details have been submitted."

That reason is not at all clear. One meaning suggested was that it was imposed simply for administrative reasons so as to avoid the defendants' rooms becoming choked with paper; but that cannot be right. The defendants keep copies of all planning permissions indefinitely. The other meaning is that it was imposed because the defendants want to know which of the permissions are likely to proceed to completion. If details are given in three years, they are likely to proceed. But if no details are given in three years, they can be ignored. That is a more plausible reason.

But I do not propose to pause long on this point. I am quite clear that non-compliance with this rule does not render the condition a nullity. If no reason is given, the condition is not thereby invalidated. That is clear from *Brayhead v. Berkshire County Council* (1). Likewise, if a reason is given which is insufficient or ambiguous. The condition is not thereby rendered a nullity. But it does give the grantee a ground of appeal to the Minister. The grantee can use it as an argument, saying that the condition should be struck out or modified. On the appeal, the planning authority may wish to supplement or explain their reasons—and if they do, no doubt the Minister would grant an adjournment to enable the grantee to meet it. But the condition is not automatically avoided.

The remedies available to the grantee

When planning permission is granted subject to conditions, then if the applicant is aggrieved with the conditions, he can appeal within 28 days to the Minister; and the Minister can set aside the condition or modify it, as he thinks right, see s. 16 of the Act of 1947. Such being the remedy provided by the Act, I think that it is *prima facie* the remedy which should be pursued by the aggrieved party, at any rate when his objection to the condition is one of fact and not of law. As WILLMER, L.J., said in *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (2):

"... it is not sufficient merely to say that the conditions are unreasonable or unduly onerous, for that would properly be the subject for appeal to the ministry under s. 16 of the Act of 1947."

Take this very case. Suppose that in the Trosley Towers Case the time limit of three years was unreasonably short and that five years would have been more reasonable, then the appropriate remedy of the applicant would be to appeal to the Minister, asking him to substitute five years for three years. Likewise, if he objected to planting trees to preserve the amenities. The applicant could not ignore the condition. He could not say: "I will take no notice of it" and then urge before the court, on enforcement proceedings, that the condition was unreasonable. Such an objection does not come within s. 23 (4) of the Act of 1947. By not appealing, he must be taken to have accepted the grant subject to the conditions contained in it. And when he sells the land with the permission, the purchaser takes it, subject to the condition also, see s. 18 (4) of the Act of 1947. He cannot take the benefit of the grant and ignore the conditions attached to it. The only

(1) 128 J.P. 167; [1964] 1 All E.R. 149; [1964] 2 Q.B. 303.

(2) 128 J.P. 120; [1964] 1 All E.R. 1.

case in which the grantee can ignore the condition is when it is bad in law or, as it is sometimes put, void ab initio. Then, of course, he can object to the condition in any court at any time, see *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (1), per VISCOUNT SIMONDS. The principle, as I see it, is that when the planning authority, acting within their jurisdiction to impose conditions, exercise it erroneously, the appropriate remedy is by appeal to the Minister. But if they go outside their jurisdiction altogether and impose a condition which they had no authority to make at all, then the condition is a nullity and void: see *Chertsey Urban District Council v. Mixnam's Properties, Ltd.* (2), per VISCOUNT RADCLIFFE. The mere fact that the condition is unreasonable is not enough. It must be so unreasonable that no reasonable authority could ever have come to it, see *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (3), per LORD GREENE, M.R.

Applying this test, I am quite clear that this condition was not so unreasonable as to be ultra vires. The appropriate remedy of the grantee was to appeal to the Minister against the condition. As he did not appeal, he is bound by it.

Severance

Assuming, however, that I am wrong and the condition is bad, the important question arises: What is the effect on the permission itself? Does the bad condition vitiate the whole of the permission, so that it is no permission at all? Or does the permission stand good in all its parts, save that it is shorn of the bad condition, with the result that it is good in perpetuity?

This question of severance has vexed the law for centuries, ever since *Pigot's Case* (4). Seeing that in this case the condition is said to be void because it is repugnant to the Act, I am tempted to go back to the old distinction taken by LORD HOBART when he said:

"The statute is like a *tyrant*; where he comes he makes all void; but the common law is like a *nursing father*, makes void only that part where the fault is, and preserves the rest"

see *Maleverer v. Redshaw* (5)—a sentiment which finds an echo in the words of HODSON, L.J., in the *Pyx Granite* case (1):

"... if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the company would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them."

But I think that the distinction between the Act and the common law no longer exists. I prefer to take the principle from the notes in the English Reports in *Pigot's Case* (4):

"The general principle is, that if any clause, etc., void by statute or by the common law, be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void . . . but if the part which is good depends upon that which is bad, the whole instrument is void."

That is the principle which we applied in contract in considering whether the

(1) [1958] 1 All E.R. 625; [1958] 1 Q.B. 544; *reversd.* H.L., 123 J.P. 429; [1959] 3 All E.R. 1; [1960] A.C. 260.

(2) [1963] 2 All E.R. 787; [1964] 1 Q.B. 214; *affd.* H.L., 128 J.P. 405; [1964] 2 All E.R. 627; [1965] A.C. 735.

(3) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

(4) (1614) [1558-1774] All E.R. Rep. 50; 11 Co. Rep. 26b.

(5) (1682), 1 Mod. Rep. 35.

avoidance of a clause avoided the whole contract or not (see *Bennett v. Bennett* (1), where the whole was held bad, and *Goodinson v. Goodinson* (2) where only the bad part was rejected and the rest held good). It is the principle implicit in what WILLMER, L.J., said in *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (3):

"... if one or two quite trivial conditions were held to be ultra vires, it could well be difficult to justify saying that the whole permission must fail... for here the conditions objected to... are fundamental to the whole of the planning permission. In such circumstances... the whole of the planning permission must fail."

Applying these principles, I think that the condition imposing a time limit of three years was of fundamental importance. The grant of outline permission was dependent on it. It went to the very root of the permission. The defendants would never have dreamt of granting an outline permission in perpetuity: for by so doing they would commit themselves and their successors to a development which might turn out to be (as it has in fact turned out to be) wholly contrary to the public interest.

On this point, therefore, I agree with the judge. If the condition was bad, the whole permission falls with it. We were told that this would have serious results: because it would mean that many houses in Kent would have been built without valid permission, and would be in danger of having enforcement notices served on them. This is all moonshine. The defendants would be estopped from saying that the permission was invalid, see *Wells v. Minister of Housing and Local Government* (4). In any case, we were told that since the judge's decision, the defendants have issued fresh permissions to anyone who wished to be reassured about it.

Conclusion

The condition here in question—that the details of reserved matters are to be submitted and approved within a specified time—has been imposed for 16 years at least by the defendants. And by other councils too, see *Hamilton v. West Sussex County Council* (5). It has been accepted by all concerned as being reasonable and valid, as is witnessed by the contractors' letter which I have read. No one has sought to challenge it in the courts until recently. It would be most unfortunate if, after all these years, the condition were to be held now to be bad, and, what is worse, for it to be held that the condition can be simply struck out, leaving those permissions shorn of the condition, good in perpetuity. Many permissions, which were thought to be dead, will be resurrected: and the defendants will either have to let them go forward (and by so doing injuriously affect the countryside) or they will have to revoke them and pay compensation to the owners (which may run into millions of pounds). The compensation would be a clear windfall for the owners who have done nothing to earn it save put in an application for outline permission years ago.

I do not think it would be right for the courts to upset a state of affairs which has continued so long without challenge; and thereby to throw the planning administrators of several counties into confusion. I would repeat in regard to planning practice what I said recently in regard to commercial practice in *United*

(1) [1952] 1 All E.R. 413; [1952] 1 K.B. 249.

(2) [1954] 2 All E.R. 255; [1954] 2 Q.B. 118.

(3) 128 J.P. 120; [1964] 1 All E.R. 1.

(4) 131 J.P. 431; [1967] 2 All E.R. 1041.

(5) 122 J.P. 294; [1958] 2 All E.R. 174; [1958] 2 Q.B. 286.

Dominions Trust, Ltd. v. Kirkwood (1). When it has grown up and become established, the courts should not seize on a flaw so as to invalidate past transactions or produce confusion.

It is a maxim of English law to give effect to everything which appears to have been established for a considerable course of time and to presume that which has been done was done of right and not in wrong. Seeing that the validity of this condition is balanced on a knife's edge, we should uphold it rather than destroy it by fine-spun arguments. I would dismiss the appeal and allow the cross-appeal.

DAVIES, L.J.: At the outset of this judgment I would desire respectfully to comment on two of the matters dealt with by LORD DENNING, M.R. It might possibly be thought that he has expressed the view that the only remedy of the plaintiffs was to appeal to the Minister against the condition imposed by the defendants and that, as they did not do so, they are bound by it. Of course, if that view were correct, it would put a complete end to this case. But in my judgment, in the light of the observations of their Lordships in *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (2), it is not correct.

It is true that the issue in that case was whether the procedure available, under s. 17 of the Town and Country Planning Act, 1947, ousted the jurisdiction of the courts to grant a declaration, whereas in the present case we are concerned with the right of appeal to the Minister under s. 16. But the point is essentially the same. It was dealt with particularly by VISCOUNT SIMONDS who observed that:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

To the same effect was the full exposition of the law by LORD JENKINS.

In the light of those observations it is, in my view, not open to this court to hold that this action (I call it one action for convenience, since in all or most essentials the two actions are similar) does not lie for the reason that the plaintiffs could have appealed to the Minister under s. 16. It is further to be observed that this point was not pleaded or argued in the court below, and that in this court, when LORD DENNING, M.R., suggested it, it was firmly rejected by counsel for the defendants, who stated categorically that, although the plaintiffs could have appealed under s. 16 to the Minister against the condition, their failure so to appeal could not prevent a later challenge to the condition. In these circumstances, therefore, the point is, with respect, not a good one and is not open to the defendants.

The other preliminary point on which I would desire to touch is the question of public inconvenience. It was pressed on the court by the defendants (and LORD DENNING, M.R., is somewhat exercised by the matter): (i) that if the learned judge's decision stands, viz., that the condition is bad and therefore the whole permission is invalidated, much development in Kent and possibly elsewhere will have been development without permission; and, conversely, (ii) that if, as contended for by the plaintiffs, the condition is bad but the permission nevertheless remains good and valid without the condition, in that event many permissions thought to have expired and become dead will be resuscitated and so cause chaos in the defendants' planning policy, and possibly involve them in the payment of large sums of compensation if they find it necessary to apply the revocation procedure. The force of these considerations is obvious but they should not,

(1) [1966] 1 All E.R. 968; [1966] 2 Q.B. 431.

(2) [1958] 1 All E.R. 625; [1958] 1 Q.B. 544; *revised* H.L., 123 J.P. 429; [1959] 3 All E.R. 1; [1960] A.C. 260.

in my view, deter the court from reaching its conclusion if it appears, at the end of the peregrinations through the maze of planning legislation, that a conclusion favourable to the plaintiffs is the correct one.

The question in this case is easy to state but difficult to answer. The outline planning permission or permissions granted by the defendants on 14th October 1952, contained two conditions relevant to the present dispute:

"(i) That details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto, shall be submitted to and approved by the Local Planning Authority before any works are begun; (ii) the permission shall cease to have effect after the expiration of three years unless within that time *approval has been notified* [my italics] to those matters referred to in condition (i) above."

Outline planning permissions are creatures of the Town and Country Planning General Development Order and Development Charge Applications Regulations 1950, but are nevertheless permissions under s. 12 of the Act and, by s. 14 (1), may be granted by the local planning authority "either unconditionally or subject to such conditions as they think fit". And, of course, if outline planning permission is granted it must by art. 5 (2) of the order be subject to the approval of the local planning authority as to what are conveniently termed "the reserved details".

Now it is, of course, true that the views of the Minister or his advisers or of the local authority as to matters of law or of the interpretation of the Act or order are not binding on the court. But it is not only of the greatest interest but of the utmost importance to see the approach of the Minister to the question as to what conditions may properly be attached to planning permissions.

The Minister's circular no. 87, dated 11th May 1950, deals on pp. 5 and 6 with outline planning permissions, and on p. 6 we find this:

"Moreover, a permission granted on an outline application is in every sense the permission required by Section 12 of the Act, and it cannot be withdrawn except by formal revocation. It is however suggested that it would be reasonable, in order to prevent the accumulation of permissions in respect of which no plans have been submitted for approval, to attach a condition to permissions of this type requiring that the plans shall be submitted within a stated period, e.g. three years."

Following this advice, the defendants prepared a standard form of application for permission, on p. 3 of which, in connection with outline applications appear these words: "The Local Planning Authority's approval in principle would be subject to the submission of the further details within three years."

It is to be observed that, so far, there is no hint of any condition as to the permission ceasing to have effect or any reference to a time limit for the approval or notification thereof by the defendants. But we were informed that the defendants have in practice, since about 1952 at any rate, been regularly attaching a condition in the terms of condition (ii) in the present case. It appears that the first submission of plans and details by or on behalf of the plaintiff company was on 19th August 1953, but that the plaintiff, Mr. Kenworthy, never submitted any plans within his three-year period.

Reference has already been made by LORD DENNING to the extensions of time granted by the defendants. But I venture to point out that these extensions were, oddly enough, expressed to be not extensions of time under condition (ii) of the permission but under condition (i) in which, of course, no time is specified. The first letter of extension, dated 26th September 1955, stated that:

"The [defendants have] agreed to extend the period requiring the details referred to in condition (i) . . . to be submitted to the [defendants] for approval for a further three years from the date of this letter."

The second extension, dated 3rd August 1958, was in similar terms. The third extension, dated 9th June 1961, was much less explicit. It does look as though the defendants were perhaps a little confused as to the precise meaning and intention of the conditions.

After an inquiry (in fact the third) held in this matter on behalf of the Minister in 1965, the inspector's legal assessor, Mr. Keidan, in para. 3 of his observations, after discussing the question whether the grant of these extensions was *intra vires* the authority said this:

"(II) There seems to be nothing in the relevant statutory provisions which either prevents a local planning authority from granting an outline permission subject to a condition that plans must be submitted within (say) three years or such extended period as the authority may allow or prevents the authority and the applicant from agreeing to extend such a time limit, where one has been imposed without an express power to extend."

It will be seen that thus, far from what may be called the ministerial approach, there is no warrant for a condition such as condition (ii) in the present case. Clearly the view is taken that a condition requiring the submission of details within a specified time is valid, but no blessing is given to a condition relating to approval or notification thereof. The position is made even clearer by circular 5/68, dated 6th February 1968, which deals with the imposition of conditions under the Town and Country Planning Act 1962. The following extracts from that circular are relevant here:

"9. . . . Unless it can be shown that the requirements of the condition are directly related to the development to be permitted, the condition is probably *ultra vires* . . .

"11. . . . Every condition must tell the developer from the outset just what he has to do [the word "he" might well be emphasised] . . .

"21. . . . The outline permission cannot be withdrawn except by a revocation order . . . If plans are not submitted within the period prescribed, the developer will then be unable to comply with the condition, and so in effect the permission lapses. *A condition requiring the developer to obtain approval of detailed plans within a stated period should not be used, since the timing of an approval is not within the developer's control.*"

The last sentence, in my view, goes to the heart of this matter. There is, to my mind, no doubt that a condition requiring the submission of plans within a stated period is a good and valid condition. Counsel for the plaintiffs argues the contrary. He submits that in order to be valid a condition imposed under s. 14 of the Act of 1947 and so under the General Development Order, 1950, must refer to the commencement, manner and duration of the development and that a condition relating to what may be called the administrative machinery of the permission is bad.

But the test of the validity of a condition in these cases is now well established. In *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (1) in this court, LORD DENNING said:

"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those

(1) [1958] 1 All E.R. 625; [1958] 1 Q.B. 544; *revised*. H.L., 123 J.P. 429; [1959] 3 All E.R. 1; [1960] A.C. 260.

conditions, to be valid, must fairly and reasonably relate to the permitted development."

And in *Fawcett Properties, Ltd. v. Buckingham County Council* (1), LORD JENKINS said:

"The power to impose conditions, though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit, is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly, the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy."

In the light of those words there is no doubt that a condition requiring the submission of details within a prescribed time would be a valid condition. It is obvious that it would be impossible for a planning authority properly to administer planning policy if at any given time there were in existence (as it were floating in the air) a large number of outline permissions of which no details had been submitted. The authority would not know whether all or any or how many of such permissions were likely to be acted on, nor would they be in a position properly to deal with other, perhaps competing applications or effect any regular planning policy. Indeed, the much criticised reason given in this case by the defendants for the imposition of condition (ii) would be a perfectly good reason for the imposition of a condition requiring the submission of details within (say) three years, though it is demonstrably irrelevant to the imposition of the actual condition (ii).

Assuming then that a condition requiring the submission of details within three years would be good, how stands this actual condition (ii) which provides for the cessation of the permission unless within three years approval has been notified? It is strongly argued for the plaintiffs that this condition is bad. The argument is put in various ways. It is said that it is an unreasonable condition, since it can neither be performed nor broken by the grantee. It is said that it amounts to a derogation from the grant and is in effect a resolute condition which can automatically terminate a permission which, once granted, can in law only be withdrawn by the revocation procedure under the Act.

The point was considered by the learned judge. But he never really pronounced on it. Rather, it led him on to consider the plaintiffs' right of appeal to the Minister from a refusal of approval by the defendants. And it was this inquiry which led him to hold that the condition was bad by reason of the fact that, in certain circumstances, it might take effect so as to defeat and render nugatory that right of appeal. I confess that this strikes me as a somewhat narrow technical ground on which to hold the condition invalid and that the situation which the judge contemplated could, if it arose, be adequately dealt with by the Minister's powers to extend time or otherwise, and I should not, for myself, be prepared to hold the condition invalid on that ground.

To return to my main theme. The defendants have, of course, a considerable safeguard by the imposition of condition (i), a mandatory condition under art. 5 (2) (i) of the General Development Order 1950. So far as concerns limitation of time, they could, as I have said, have imposed a condition requiring the submission of the reserved details within three years, and if the plaintiffs failed so to submit their plans the permission would no doubt, as suggested in the Minister's circular, lapse. But such a lapse would be caused by the default of the plaintiffs

(1) 125 J.P. 8; [1960] 3 All E.R. 503; [1961] A.C. 636.

themselves, viz., their failure to submit within the three years; and the effect of condition (ii) is that the permission may lapse without any default on the part of the plaintiffs.

In my judgment such a condition is unreasonable and bad. It means that in effect the defendants are taking away with one hand that which they have purported to grant with the other and are thus evading the revocation procedure.

This conclusion which I have reached seems to me to be fortified by the new "time" provisions in the Town and Country Planning Act 1968. It is not necessary here to consider these in any detail, since they will be fully discussed in the judgment which WINN, L.J., is about to deliver. But the most striking provisions of that Act in this regard are to be found in s. 65. By s. 65 (2) (a) there is to be implied in the cases to which the subsection applies a condition:

"that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the commencement of this section."

By sub-s. (3) the provisions of sub-s. (2) are excluded in the case of pre-existing permissions which are subject to an express condition that application for approval of reserved matters should be made within a specified time. And by sub-s. (5) if any fresh outline permission is granted, it shall be subject to a condition that application for approval of reserved matters must be made not later than three years from the grant of permission. Nowhere does one find any suggestion of a condition, express or implied (apart, of course, from the provisions of art. 5 (8) of the General Development Order 1950) prescribing a time or a period within which approval must be given or notified to the applicant by the planning authority.

It is true that the provisions of the Act of 1968 are not strictly relevant to the construction of the Act of 1947. Nevertheless it does seem to me that these provisions underline what I take to be the meaning and policy of the legislation throughout, in accordance with the views expressed by the Minister as already pointed out, and also in accordance with common sense, though that may be a dangerous horse to ride in this particular field. In my view, therefore, condition (ii) in these permissions was bad and invalid.

There remains to be considered the question of what has conveniently been called "severability", that is to say the question whether, if the condition be bad, the whole permission falls to the ground or whether it remains good, unfettered by the condition. The learned judge, having held, on the ground indicated by him, that the condition was bad, decided that that invalidity destroyed the whole permission, on the basis that in the circumstances the planning authority would never have granted outline permission at all without attaching to it some other appropriate and valid condition.

This view was primarily based on the observations of HODSON, L.J., in the *Pyx Granite* case (1). There he said:

"In any event it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constat but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the company would be left without any

(1) [1958] 1 All E.R. 625; [1958] 1 Q.B. 544; *revised* H.L., 123 J.P. 429; [1959] 3 All E.R. 1; [1960] A.C. 260.

planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them."

It is to be respectfully observed that these remarks were obiter and that the point was not touched on in the speeches made in that case in the House of Lords.

The views of HODSON, L.J., were, however, followed by this court in *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (1). That was a case where the planning authority had imposed a condition to the effect that the applicants should construct an ancillary road over the entire frontage of the site at their own expense, as and when required by the local planning authority, and should give right of passage over it to and from such ancillary roads as might be constructed on the adjoining lands. That condition was held to be unreasonable, and this court, in effect, held that the matters covered by the condition were so fundamental to the whole development that it could be certainly said that without some similar but valid condition permission would never have been granted. WILLMER, L.J., after referring to doubts expressed by ROXBURGH, J., in *Fawcett Properties, Ltd. v. Buckingham County Council* (2), said:

"... here the conditions objected to by the plaintiffs are fundamental to the whole of the planning permission. In such circumstances I would follow the dictum of HODSON, L.J., and hold that the whole of the planning permission must fail."

HARMAN, L.J., expressed a similar opinion and pointed out that the question of access to the Brighton Road was in that case a matter of the greatest importance to the planning authority. And PEARSON, L.J., agreed with the views of the other members of the court.

In the court of first instance in *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (1), GLYN-JONES, J., who was reversed in this court on the point of the reasonableness of the condition, said:

"If one came to the conclusion that upon all these matters which a planning authority might properly take into consideration the planning authority had given permission but by going beyond matters which they might properly take into consideration they have imposed some condition which was beyond their powers, I might in such a case think it proper to say that the grant of planning permission should stand."

And it is interesting to note that the same learned judge in *Allnatt London Properties, Ltd. v. Middlesex County Council* (3), decided after the judgment of this court in *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (1), gave effect to the view which he had previously expressed by holding that on the particular facts of that case an irrelevant and invalid condition did not invalidate the permission as a whole.

The true test is that if there is imposed on a permission an invalid condition which relates to matters fundamental to the development then in such a case the whole permission is or may be void. But if, as here, the invalid condition relates not to the development itself but to matters preparatory or introductory to the permission or its final form, then the outline permission should rightly be held to have been granted free from the condition. The condition here in question did not relate to and was unimportant to the actual development, though it may well have been administratively convenient for the planning authority.

(1) 128 J.P. 120; [1964] 1 All E.R. 1.

(2) 125 J.P. 8; [1960] 3 All E.R. 503; [1961] A.C. 636.

(3) (1964), 62 L.G.R. 304.

In sum, therefore, I am of the opinion that condition (ii) was invalid but that nevertheless the outline permission was validly granted and still subsists and that accordingly the plaintiffs are entitled to both declarations claimed. I would add that I have had the opportunity of reading in advance the judgment which is about to be delivered by WINN, L.J., and would desire to express my appreciation of his close examination of the relevant statutory provisions and authorities. He has reached the same conclusion as I have done though by a somewhat different route and I would respectfully say that I am in general agreement with his reasoning.

WINN, L.J.: The essential problems raised by this appeal are: (I) whether the second condition attached to the outline planning permission granted to each of the plaintiffs in October 1952 is valid or invalid; and (II) whether in the event of the court holding it to be invalid the permission should itself stand or fall.

The first limb of this problem must be solved by determining the answer to the question—is it competent for a planning authority when granting an outline permission so to circumscribe the operation of the permission that it will cease to be of any effect unless within a stated period of time approval has been given to details of design and siting, and of any other matters properly reserved in accordance with the provisions in the General Development Order 1950 regulating the procedure for the grant of outline permission.

It seems right to concentrate rather on the time element contained in the limiting provision grafted on the permission than on the element that its operation is susceptible of unilateral control, inasmuch as it rests with the planning authority to grant or withhold approval of the details and it is not open to the applicant to ensure that he will obtain approval. The point can be highlighted by asking the questions: (a) can any permission be so framed that it will lapse after a period of time? (b) if so, whence is derived the power so to frame it and what is the ambit of that power?

Nonetheless, the characteristic of deprivation of the applicant of ability to secure by his own efforts full enjoyment of the fruits of the permission granted to him is an important and objectionable feature of the condition challenged.

Moreover it should be borne in mind: (i) that a condition attached to an outline planning permission requiring that reserved matters be approved within a fixed period, in default of which the permission will lapse, is susceptible of being used, and in the instant case may in fact have been used, as a device enabling belated exercise of a discretion to prohibit development which ought to have been exercised when deciding whether or not to grant the original application for outline permission. I shall return to this matter. (ii) that any such condition if it exists in the planning world is *sui generis* since it is a characteristic of all usual planning conditions that they impose a restraint on use or other development which if not observed can be enforced by procedures originally provided for in s. 23 of the Town and Country Planning Act 1947.

The most solid ground on which an attack can be launched on the validity of the condition in question is that of repugnancy, viz., repugnancy to the effect and policy of the town and country planning legislation and in particular of the Act of 1947 which was in force at the relevant time.

In a circular dated 6th February 1968, no. 5/68, issued by the Ministry of Housing and Local Government in order to provide "guidance on the use of the power to impose conditions on planning permissions", it was stated in para. 21, *inter alia*—

"An outline permission is in every sense the permission required by section 13 of the Act . . . The outline permission cannot be withdrawn except by a

revocation order . . . A condition requiring the developer to obtain *approval* of detailed plans within a stated period should not be used, since the timing of an approval is not within the developer's control."

While the Minister is not, and would not, I am sure, claim to be authoritative in declaring the law, he is, indisputably, an excellent source of information about matters of policy and practice in planning control: I am happy to find that the advice to planning authorities which I have quoted accords exactly with my own understanding of the law governing revocation of outline permissions, and further that the Minister shares my own disapproval of unilateral conditions, viz., conditions compliance with which can only be secured by the party who imposes them.

The law which at the material time defined the nature of an outline planning permission is to be found in Part 3 of the Town and Country Planning Act 1947, and in the General Development Order 1950.

Section 14 (1) of the Act provides:

"(1) Subject to the provisions of this and the next following section, where application is made to the local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; . . .

"(2) Without prejudice to the generality of the foregoing subsection, conditions may be imposed on the grant of permission to develop land thereunder—(a) for regulating the development or use of any land under the control of the applicant . . . (b) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the expiration of a specified period . . . and any permission granted subject to any such condition as is mentioned in paragraph (b) of this subsection is in this Act referred to as permission granted for a limited period only."

The interpretation section of the Act, s. 119 (1), expressly enacts that the phrase: " 'permission granted for a limited period only' has the meaning assigned to it by section fourteen of this Act ".

I have formed the opinion that, on the proper construction of s. 14 (2), the intention of Parliament was that the only form of planning permission which it was competent for planning authorities to grant for a limited period of time, or in any form which would by an internal limiting provision lapse after a period of time had expired, was the special type of permission defined by s. 14 (2) (b), the specific purpose of which is clearly stated in that paragraph and is concerned rather with the use of land than with building operations on land.

Unless a permission can be legitimately destroyed by outside means it must not have built into it a self-destructive device, such as rockets include. Naturally I have not overlooked the presence in s. 14 (2) of the opening words "Without prejudice to the generality of the foregoing subsection."

Notwithstanding these words, it is my opinion that the principle of construction *expressio unius exclusio alterius* is properly applicable to the provisions of the section as a pointer to but not as a conclusive demonstration of the intention of the legislature. The saving words "without prejudice", etc., are in themselves so general and so completely lack any indication of the scope of the potential reservation which, perhaps *ex abundanti cautela*, they may have been intended to embrace, that they should not be given any great effect. Had Parliament's intention, when passing the Act of 1947, been to provide without qualification that local planning authorities might impose on permissions which they granted time limits



at the expiration of which the conditions would lapse, that intention would more probably have been conveyed either by making express reference to time limitations in s. 14 (1) or by omitting altogether the express reference to such a form of limitation in s. 14 (2) (b).

It is my opinion that planning authorities were not empowered by the Act of 1947 to impose otherwise than within the ambit of s. 14 (2) (b) any time limit on the currency or validity of a planning permission which would by its own force cause the permission to lapse at the expiry of a stated period of time.

I shall return later to a consideration of the relevance in this connection of the provisions of s. 41 (3) of the Caravan Sites and Control of Development Act, 1960. Before leaving the Act of 1947, I should also mention certain other provisions. By s. 18 (1) and (2), it was enacted that the power to grant permission to develop land should include power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application, or for the continuance of any use of land instituted before that date without permission or in accordance with permission granted for a limited period only. This is another instance of an express power to relate the permission to a period of time.

By s. 18 (4) it was enacted that subject to any express contrary provision contained in a permission, any permission shall endure for the benefit of the land and of any persons for the time being interested therein. Section 18 (5) contains a reference to the effect, in relation to resumption of normal user of land, of the expiration of a permission to develop land granted for a limited period only: this reference might, at first sight, appear to recognise the existence of permissions conditioned generally by reference to a limited period of time were it not for the fact that, by force of the definition referred to above, the expression "permission to develop land . . . for a limited period only" cannot connote any permission other than such a permission as is expressly empowered by s. 14 (2) (b).

Section 19 imposes an obligation in certain circumstances to purchase land from an owner to whom permission to develop it has been refused, or granted subject to conditions, but does not it seems expressly contemplate any case where permission has been granted but has lapsed owing to the expiry of a period of time. The court did not hear any argument about the relevance, if any, of this section to the present appeal; it would be wrong to say more than that if permissions limited in duration are valid it might possibly afford a means of avoiding compensation for refusal of permission by granting permission for a limited time. Section 20 has like content. Section 21 and s. 22 provide expressly for revocation or modification of permissions granted and for payment thereupon being made to reimburse expenditure incurred and rendered abortive or other loss or damage sustained.

The Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, set out in Pt. 2 of Sch. 1 two forms of standard conditions, neither of which related in any way to any time period; it enacted that development of any class specified in Pt. 1 of that schedule might be undertaken without any other permission, but that any permission so granted by the order should be subject to any condition or limitation imposed in the said schedule, many of which conditions include one or both of the standard conditions: none of the classes of development specified in the schedule is made subject to any time condition other than Class IV which comprises "Temporary buildings or uses" and is, therefore, within the ambit of the express statutory power in s. 14 (2) (b) of the Act of 1947.

Article 5 (2) of the order provided that an application for planning permission might be made expressly as an "outline application" and any such application

would have effect as an application for permission for the erection of buildings subject to the subsequent approval of the authority with respect to any matters relating to the siting, design or external appearance of the buildings, or the means of access thereto. In such a case particulars and plans in regard to those matters were not to be required and permission might be granted subject to such subsequent approval and, I quote: "with or without other conditions". These quoted words, are, I recognise, capable as a matter of language of being understood to imply a general unqualified power to impose any type of condition including a time condition but in my opinion again in the context of the order as in that of the Act such a wide construction is not acceptable: the order cannot, of course, go wider than the Act in granting powers to planning authorities. The order makes no mention of revocation or lapse of permissions.

With the concept of a planning permission derived from the foregoing indications, positive and negative, found in the Act and the order there is to be compared or contrasted the permissions now before the court on which have been imposed by the defendants conditions providing that they should lapse at the expiry of three years unless in the meantime approval had been granted of details submitted by the applicants, which is equivalent, as I see it, to a permission lapsing after three years unless in the meantime it is extended by the authority which granted it; which again is equivalent to a permission valid only for three years.

There is a general principle that any exercise of powers derived from a statute must not be repugnant to the provisions of the Act. The application of the principle is not limited to purported exercises of delegated statutory powers, but is perhaps best illustrated by examples from this field. In *Gentel v. Rapps* (1), CHANNEL, J., said:

"A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it make unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land. I say 'by necessary implication' because I have in mind the cases with respect to by-laws prohibiting persons from travelling on railways without a ticket. In those cases by-laws which impose the same penalty as the general law without making a fraudulent intention part of the description of the offence have been held to be bad, because the statute creating the offence says that there must be a fraudulent intention on the part of the person charged with travelling without a ticket, and the by-law, therefore, by implication alters the general law."

Section 2 of the Colonial Laws Validity Act, 1865, provides expressly that any colonial law which is or shall be in any respect "repugnant" to the provisions of any Act of Parliament extending to the colony to which such law may relate, or to any order or regulation made under authority of such Act of Parliament, shall to the extent of such repugnancy be and remain absolutely void and inoperative.

In the construction of deeds it is well established that if there are two clauses or parts of a deed repugnant to each other the first will be received and the latter rejected, unless there is some special reason to the contrary: cf., per SIR JAMES MANSFIELD, C.J., in *Doe d. Leicester v. Biggs* (2) and *Forbes v. Gii* (3).

(1) 66 J.P. 117; [1900-03] All E.R. Rep. 152; [1902] 1 K.B. 160.

(2) (1809) [1803-13] All E.R. Rep. 546; 2 Taunt. 109.

(3) [1922] 1 A.C. 256.

In the law relating to gifts it is authoritatively established that where there is an absolute gift of real or personal property and a condition is attached which is inconsistent with and repugnant to the gift, the condition is wholly void and the donee takes the gift free from the condition: cf., *Bradley v. Peixoto* (1); *Re Cockerill, Mackaness v. Percival* (2).

Where an estate is granted in fee simple it may be granted on a condition subsequent, and if the event contemplated by the condition happens the grantor can re-enter and determine the estate; but since an estate in fee simple is in its nature alienable a condition in restraint of alienation is repugnant and therefore void: cf. *LITTLETON TENURES*, 360, Co. Litt. 206b.

In the case of *Re Tewkesbury Gas Co., Tysoe v. Tewkesbury Gas Co.* (3), the court had to consider the effect of a series of debentures each of which contained a covenant by the company that it would "on or after" 1st January 1898 pay to the registered holder of the debenture the principal sum thereby secured, and went on to state—

"the debentures to be paid off will be determined by ballot, and six calendar months' notice will be given by the Company of the debentures drawn for payment."

The company never paid any of the debentures or held any ballot: after the date stated a debenture holder sued to enforce the security. It was held that on the proper construction of the covenant the principal money was presently due and payable and that if the provision as to balloting and notice meant that the company was not bound to pay until these conditions had been satisfied that provision was void for repugnancy. PARKER, J., said:

"In the case of a covenant to pay on or after a certain date . . . there is . . . no liability until after the day is passed, and possibly not even then, until demand be made. It is true that any subsequent day for ever would be after the day named, but it would appear that an obligation to pay solvendum nunquam or solvendum at Doomsday is an obligation to pay in praesenti, or at any rate on demand, the solvendum only being rejected: see SHEPPARD'S TOUCHSTONE, p. 369."

PARKER, J., also said:

"... if there be a covenant to pay, with a proviso that the covenant shall only be enforced at the option of the covenantor, the proviso would, in my opinion, be void for repugnancy on the principle stated in SHEPPARD'S TOUCHSTONE at p. 273 . . ."

The question whether the condition sought to be impugned by this appeal is repugnant to the permission to which it is attached may be crystallised by asking: What was by force of the Act granted by the permission? Does the condition cut down that grant? By the two outline applications submitted in March 1952, in respect of the Trosley Towers Estate (references TH/6/52/83 to Strood Rural District Council and MK/4/52/97 to Malling Rural District Council) and attached letters a description was given of an area of 365 acres—

"on the upper part of the escarpment facing south, wooded land on the top of the escarpment to a point roughly in the middle of the Estate, and scrubland on the eastern part"

(1) (1797), [1775-1802] All E.R. Rep. 561; 3 Ves. 324.

(2) [1929] 2 Ch. 131.

(3) [1911] 2 Ch. 279; *affd.*, C.A., [1912] 1 Ch. 1.

and a brief outline was afforded of the proposed scheme for residential development of these several areas together with a possible partial industrial development.

Specific mention was made of the type and location of the housing development contemplated—

“the lower income group houses will have 2/3 bedrooms, the middle 3/4 and the middle and upper income groups beneath the highway and on the escarpment will be planned to individual needs.”

The form to be used and used for the application contained a note

“The local planning authority's approval in principle would be subject to the submission of . . . further details within three years . . . it will be necessary for the applicant [for outline permission] to submit sufficient written information as to the proposals to enable the Local Planning Authority to assess their merits from a planning point of view.”

By a letter of 29th May 1952, following an interview with the planning officer, a density plan and schedule, related to the various proposed sections of the contemplated estate was submitted.

On 14th October, 1952, the defendants granted permissions: (i) for development of land situate in the parish of Meopham, and being the development of the land in accordance with the particulars supplied with your outline application TH/6/52/83; (ii) for development of land situate in the parishes of Trottescliffe, Stansted and Wrotham and being the development of land in accordance with the particulars supplied with your outline application MK/4/52/97.

On each of these permissions conditions were imposed. The last mentioned, ref. MK/4/52/97 was made subject, inter alia, to a condition, no. (iii), that details to be subsequently submitted for approval—

“shall not include provision for buildings to be erected on the escarpment of the North Downs or along the frontage to the Pilgrims Way.”

It has not been suggested in this appeal that this condition could be impugned as ultra vires or as involving any abuse of the discretionary power of the defendants to prohibit development for proper planning reasons. Whatever be the outcome of the appeal it is clear that no permission has been granted or otherwise exists to erect any buildings on the said escarpment or along the frontage to the Pilgrim's Way. Thus the answer to the question: what was granted, is twofold: On TH/6/52/83, it is: What was applied for? On MK/4/52/97, it is: What was asked for and applied for. On MK/4/52/97, it is: What was asked for and not refused.

Both permissions also were purportedly made subject, inter alia, to a condition reading—

“the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified [of details relating to lay-out, etc.]”

By subsequent correspondence the defendants extended the time applying for approval on each reference to 26th September 1962. On 18th September 1962, by which time only 200 acres of the original 365 remained wholly undeveloped and were then owned by a Mr. Shahmoon the defendants took note of the fact that the Minister had consulted them on the question whether it was expedient that an order should be made under s. 21 of the Act of 1947 modifying the two planning permissions so as to exclude the said 200 acres: had such an order been made it would have involved payment of compensation. A minute records that:

"The Clerk of the County Council...reminded the Members [of the General Purposes Sub-Committee of the Planning Committee] that the [defendants] had never intended that the whole estate should be developed but had felt that the conditions imposed on the original permissions were such as to ensure that once an acceptable proposal for development of that part of the estate which could be developed in accordance with the conditions had been agreed the whole permission would have been expended."

Refusal of any further extension was then resolved on.

The clerk then wrote a letter of 16th October 1962, conveying this refusal in which he said:

"You will be aware that the [defendants] have always made it clear that no development would be permitted on the escarpment of the North Downs or along the frontage of the Pilgrims Way. The area in which development has been precluded corresponds broadly to the area of 200 acres which your client has retained..."

It was not made clear to the court, or at any rate to me, whether the whole, or all but a minor part of the 200 acres is affected by the refusal of permission to build conveyed by condition no. (iii) of permission MK/4/52/97. Insofar as this is so, the clerk's letter is correct and as a matter of law and of fact there can be little substance in this appeal; insofar as any substantial part of the area is within permission TH/6/52/83, the position is different. It seems to me that the defendants were not entitled in law without paying compensation to modify either permission, as in effect they sought to do, but not expressly, in October 1962. Insofar as in order to justify their refusal then to consider any further application for approval of details in respect of the 200 acres they have to rely on the time condition on the original permissions, their position is tantamount to asserting that the condition did cut down the grant just as much as if it had said expressly: what is now granted may be subsequently revoked or reduced.

It has been argued by counsel for the defendants that a condition limiting the duration of the validity of a permission has been impliedly approved by Parliament by the enactment of s. 41 (3) of the Caravan Sites and Control of Development Act 1960, and therefore cannot be "repugnant". There is an argument which merited and has received careful consideration by the court; s. 41 (3) provides as follows:

"It is hereby declared that where—(a) permission is granted in Part III of the Act of 1947 for development consisting of or including the carrying out of building or other operations subject to a condition that the operations shall be commenced not later than a time specified in the condition, and (b) any building or other operations are commenced after the time so specified, the commencement and carrying out of those operations do not constitute development for which that permission was granted."

In relation to "commencement" of operations, regard should be had to the provisions of s. 64 (3) of the Land Commission Act 1967, which seem to enable developers to escape levy by, e.g., digging a foundation trench.

In considering the effect, for relevant purposes, of this declaration it is to be observed first, that it does not comprise any statement that such a permission as is referred to shall be treated as having lapsed; it is limited to providing that building or other operations commenced after the specified time are not to be regarded as authorised by the permission. The subsection is contained in a fasciculus of sections, beginning with s. 33 of the Act, all contained in Part 2 which relate particularly to enforcement procedures, provided in order to give

effect to general control of development. It should not be given wider effect unless such effect was clearly intended.

I further observe that the commencement of building or other operations is something which is or should be within the control of the grantee of the permission and is not solely dependent on the will of the grantor.

Insofar, if at all, as the intention of Parliament about the ambit of conditions, related to the passage of time attached to planning permissions granted under the Act of 1947, is legitimately to be derived from later legislation much clearer, and for present purposes more relevant, guidance is afforded by the Town and Country Planning Act 1968. Section 64 (1) provides:

"Subject to the provisions of this section, every planning permission granted or deemed to have been granted before the commencement of this section shall, if the development to which it relates has not been begun before the beginning of 1968, be deemed to have been granted subject to a condition that the development must be begun not later than the expiration of five years beginning with the said commencement."

This provision is not to have universal application since it is provided by s. 64 (4):

"Nothing in this section applies—(a) to any outline planning permission, as defined by section 65 below; (b) to any planning permission granted by a development order; (c) to any planning permission which was granted or deemed to be granted, before the commencement of this section, subject to an express condition that the development to which it relates should be begun, or be completed, not later than a specified date or within a specified period; or (d) to any planning permission granted for a limited period (within the meaning of section 18 of the principal Act); (e) to any planning permission granted under section 20 of the principal Act on an application relating to buildings or works completed, or a use of land instituted, before the date of the application."

It is expressly provided by s. 65, sub-s. (2) and sub-s. (3) as follows:

"(2) Subject to the provisions of this section, where before the commencement of this section outline planning permission has been granted for development consisting in or including the carrying out of building or other operations, and the development has not been begun before the beginning of 1968, that planning permission shall be deemed to have been granted subject to conditions to the following effect:—(a) that, in the case of any reserved matter, application for approval must be made not later than the expiration of three years beginning with the date of the commencement of this section; and (b) that the development to which the permission relates must be begun not later than whichever is the later of the following dates,—(i) the expiration of five years from the date of the commencement of this section; or (ii) the expiration of two years from the final approval of the reserved matters, or in the case of approval on different dates, the final approval of the last such matter to be approved.

"(3) Subsection (2) above shall not apply to a planning permission granted before the commencement of this section subject to an express condition that the development to which it relates should be begun, or be completed, or that application for approval of any reserved matter should be made, not later than a specified date or within a specified period."

Section 66 (5) re-enacts in substance the provisions of s. 41 (3) of the Caravan Sites and Control of Development Act 1960 by providing expressly that, where

the effect of the new Act is to attach time conditions to a permission, developments carried out after the date specified by the permission shall be treated as not authorised by the permission and applications for approval of a reserved matter not timeously made shall be treated as not made in accordance with the permission.

Section 67 enacts a new method of control of development which is to apply where, by virtue of s. 64 or s. 65, a planning permission is subject to a condition that the development permitted must be begun before the expiration of a specified period and development has been begun within that period but not completed within it; in future the planning authority may in such circumstances serve a "completion notice" which is to have the effect of bringing the permission to an end at the expiration of a further specified period of not less than 12 months, whereupon it will "cease to have effect" and (cf., sub-s. (5)) "be invalid except so far as it authorises any development carried out thereunder up to the end of that period", unless in the meantime the notice has been withdrawn.

Certain comments on the provisions of this new Act are obvious even on a first reading of it: 1. Express provision is not made for the expiry of planning permissions not comprised in the category of "permissions granted for a limited period" which s. 14 (2) (b) of the Act of 1947 empowered authorities to issue. Again, as I see it, the implication conveyed by the phrase *expressio unius exclusio alterius* is applicable. 2. The new Act not only contemplates but provides for time conditions regulating the periods within which: (a) applications for approval on reserved matters are to be made; (b) permitted development is to be begun; (c) such development is to be completed. It does not refer at all, otherwise than in s. 66 (5) referred to above, to lapse of permission by force of any condition related to the expiry of time, and even in that provision does not purport to destroy or terminate the permission. 3. It seems that the deemed conditions set out in s. 65 (2) could not viably co-exist with any condition producing lapse of the permission at the expiry of a time period unless within that period approval of details had been granted.

For my part I consider that the new Act is consistent with and, indeed, tends to support, whereas none of the authorities cited to the court is inconsistent with or tends to exclude, the view that a valid, and it may well be conclusive, test of the validity of any limiting condition imposed on a planning permission, other than one within the ambit of s. 14 (2) (b) of the Act of 1947, is whether any qualification attached to it defines, by some phrase equivalent to an adjective, the type or extent of development, as distinct from similarly defining the permission itself, as one which is ephemeral or otherwise less than an absolute permission: the former category would be valid, the latter invalid.

In *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (1), in the Court of Appeal, LORD DENNING said:

"Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

It may be that LORD DENNING did not have in the forefront of his contemplation the point which I am now seeking to make since he went on to say:

"The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

(1) [1958] 1 All E.R. 625; [1958] 1 Q.B. 544; *revid.* H.L., 123 J.P. 429; [1959] 3 All E.R. 1; [1960] A.C. 260.

Nonetheless, the distinction between control of the development and control of the permission is made in those words.

In the case of *Fawcett Properties, Ltd. v. Buckingham County Council* (1), in the House of Lords, LORD JENKINS stated the criterion in somewhat wider terms; again I venture respectfully to think that he did not have in mind the particular point of distinction between limitation of development and limitation of permission. He said:

"The power to impose conditions, though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit, is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly, the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy."

In neither of the cases where their Lordships expressed these dicta were they concerned with any form of limitation related to time. However, in *Re 42-48 Paddington Street and 62-72 Chiltern Street, St. Marylebone, Marks & Spencer, Ltd. v. London County Council* (2), a permission had been granted on detailed plans and specifications for the erection of certain buildings subject to the condition that the work should be completed within 18 months, failing which the consent was to become void. The Court of Appeal held by a majority that in the particular circumstances works for the erection of a building had been timeously begun (cf., s. 78 (1) of the Act of 1947) and unanimously that the L.C.C. having failed to give any reason for the condition had no power to impose it and that, accordingly, there was a deemed unconditional permission by force of s. 10 (3) of the Town and Country Planning Act 1932. SIR RAYMOND EVERSHED, M.R., said that he found nothing in the Act entitling the court to say that conditions imposed must not include conditions as to time.

JENKINS, L.J., rejected the view that because the permission was expressed to become null and void after a period of time it was ultra vires and therefore bad. He said:

"There is nothing expressly to the effect that conditions as to time are not to be imposed, and I can find nothing in the other provisions of the Act which would make the imposition of a time condition so palpably repugnant as to be by necessary implication outside the purview of the Act, and, therefore, ultra vires. Accordingly, I cannot accept the argument based on ultra vires, though the plaintiffs achieve the same goal by a different road."

MORRIS, L.J., concurred with these dicta, which were all plainly obiter, without giving any separate reasons.

It is more pertinent to observe not so much that none of those judgments rested on the ruling that the time condition there considered was validly imposed but that the condition was so framed that it affected the carrying out of the development by limiting the development permitted to such development as was completed within the specified period. As I see it, there is a real distinction between a permission for development already defined by an approval subject to conditions regulating the manner and period in which it is to be carried out and a permission for development made subject to a time condition for the

(1) 125 J.P. 8; [1960] 3 All E.R. 503; [1961] A.C. 636.

(2) [1951] 2 All E.R. 1025; *reversed*. C.A., 116 J.P. 286; [1952] 1 All E.R. 1150; [1952] Ch. 549; *affd.*, H.L., 117 J.P. 261; [1953] 1 All E.R. 1095; [1953] A.C. 535.

obtaining of approval, which may produce the result that nil development will be permitted.

Having regard to the reasoning which has led me to the conclusion that the condition in question in this appeal should be declared to be void, as repugnant to the Act and ultra vires, I am not greatly concerned with the logically subsidiary questions: (a) whether it would have served some genuine planning purpose; (b) whether the reason given for it supports the condition; obviously it does not nor should the court give any effect to the plea that because it was incompetently drafted it should be rectified by amendment.

It is, of course, plain that planning administration may be overwhelmed by clogging of its procedure by unimplemented permissions and it is therefore reassuring to know that the Act of 1968 provides appropriate time controls. This consideration goes no way at all towards persuading me that the attempt made by the defendants to achieve a like protection without the approval of Parliament should be ratified by this court. No doubt it was fundamental in their motivation but not I think to the permitted development.

In saying this I do not express any doubt that counsel for the defendants was right in submitting that both the condition impugned and the reason which, though somewhat inaptly worded, tends to some extent to support it, are reasonably capable of being considered relevant to the implementation of a planning policy, for the avoidance of confusion and embarrassment arising from an accumulation of permissions. Nor am I basing my view as to the outcome of this appeal on the inadequacy of the reasons stated to support fully the terms of the condition. I have in mind what was said in the *Fawcett* case (1) and as well as some observations of my own in *Brayhead (Ascot), Ltd. v. Berkshire County Council* (2).

In deference to counsel for the defendants' detailed examination of the principles enunciated in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (3), I would say that I have carefully considered whether those principles afford a relevant criterion for judging the validity of the condition here in question, but I am quite satisfied that the instant case does not turn on any issue of reasonableness but rather on one of repugnancy.

Counsel for the defendants submitted that in any event the condition could not be severed so as to enable the permission to stand shorn of it. He stressed what has probably to be accepted as factually correct that the defendants would not have granted any permission which was not made subject to that condition or one to a very similar effect. Although I appreciate that weight must be given to that submission, particularly since it prevailed with the learned trial judge, I am quite unable to accept it as consistent with the view which I have myself formed that the condition is ultra vires. If the condition is ultra vires it is void; if it is void it can have no effect on the force of the permission itself; so far as the permission is concerned it was granted by a responsible authority and by their own decision was kept alive from October, 1952, until September, 1967, and in accordance with the principle *ut res magis valeat quam pereat* it should survive, notwithstanding the submission that the seeds of its mortality were sown in it by corruption from the condition grafted on it.

Taking another glance at practice rather than law I would say that the tests for deciding whether to impose a particular condition set out in para. 6 of the Ministry Circular 5/68 are well framed and set them out here with the answers which I would give in relation to the present case: (a) Is it necessary? No,

(1) 125 J.P. 8; [1960] 3 All E.R. 503; [1961] A.C. 636.

(2) 128 J.P. 167; [1964] 1 All E.R. 149; [1964] 2 Q.B. 303.

(3) 112 J.P. 55; [1947] 2 All E.R. 680; [1948] 1 K.B. 223.

though no doubt desirable for the defendants. (b) Is it relevant to planning? Yes. (c) Is it relevant to the development to be permitted? No. (d) Is it enforceable? No. (e) Is it precise? No. (f) Is it reasonable? No.

In summary I am of the opinion that the defendants, in all good faith, by a mistake as to the law, sought to retain freedom for later decision of a matter of general planning policy, which they should have decided before granting or refusing outline permission, by imposing a condition which is null and void.

The two cases which have come together before the court are in principle not distinguishable, though I think that the observation made in the preceding paragraph applies with particular relevance to the case of the plaintiff Mr. Kenworthy. In each appeal I would allow the appeal and declare that the planning permission granted remains in force; and that s. 65 (2) of the Act of 1968 will apply to each of the permissions with the result that the conditions therein set out will be deemed to apply to that permission, but that no further effect can in law be given to the second condition imposed when those permissions were granted.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Barlow, Lyde & Gilbert*, for *Girling, Wilson & Harvie*, Margate; *Argles & Court*; *Sharpe, Pritchard & Co.*, for *T. Heckels*, Maidstone.

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS, L.J., THOMPSON AND MILMO, JJ.)

November 11, December 18, 1968

R. v. BERRY. R. v. STEWART

Customs—Goods chargeable to duty—Concession enabling goods to be imported duty free for use by United States forces—Goods given away by United States serviceman—Customs and Excise Act, 1952 (15 & 16 Geo. 6, and 1 Eliz. 2, c. 44), s. 304.

The first appellant, a United States serviceman, gave to the second appellant cigarettes, wine and spirits which had been imported free of duty into the United Kingdom under a concession allowed in respect of goods for use by the United States forces. The appellants were convicted of being knowingly concerned in dealing with goods which were chargeable with duty which had not been paid, with intent to defraud the Crown, contrary to s. 304 of the Customs and Excise Act, 1952.

HELD: as the goods were chargeable with duty under ss. 1, 3 and 4 of the Finance Act, 1964, they were "goods chargeable with a duty which has not been paid" within the meaning of s. 304 of the Act of 1952; as the concession was based on an agreement and not on statute, it could not have the effect of causing the goods to cease to be chargeable, whatever its terms, and the limits of the concession were relevant only to the issue of intent to defraud; nor did the goods cease to be chargeable because, by reason of the concession the Customs and Excise did not collect the duty on them; therefore, the convictions were right.

APPEALS against conviction.

The appellants, James Edward Berry and Valerie Carol Stewart, were convicted, on 25th September 1967, at Oxford City Quarter Sessions before the assistant recorder (FRANCIS BARNES, Esq.) and a jury on four counts of being knowingly concerned in dealing with goods with intent to defraud the Crown contrary to s. 304 of the Customs and Excise Act 1952. The appellant Berry was

fined £20 on each count (£80 in all) or two months' imprisonment in default, and the appellant Stewart was conditionally discharged for a period of 12 months and ordered to pay £15 towards the costs of the prosecution. Both appellants appealed against their convictions pursuant to a certificate granted by the assistant recorder under s. 3 (b) of the Criminal Appeal Act 1907, on the following grounds. (i) That the assistant recorder was wrong in law in rejecting at the end of the prosecution case the defence submissions that there was no case to answer. (ii) That in ruling on the submissions the assistant recorder was wrong in law in holding that goods were "chargeable" under s. 304 of the Customs and Excise Act 1952 immediately on their arrival in England, even if they had been imported under diplomatic concession for the use of U.S. forces and even while they remained within the boundaries of the concession. (iii) That in ruling on the submissions the assistant recorder was wrong in law in holding that the word "chargeable" as aforesaid meant the same as dutiable and that there was no need to read anything positive into a distinction between the words "attachable", "leviable", "dutiable" or "chargeable", as referred to in *Schneider v. Dawson* (1), and the cases therein referred to. (iv) That in ruling on the submissions the assistant recorder was wrong in law in holding that the burden of proof that goods were not "chargeable" was on the defence on the ground that it fell within the words "description or nature" under s. 290 (2) (b) of the Act of 1952. (v) That in ruling on the submissions the assistant recorder was wrong in law in holding that the burden of proving the terms and the boundaries of the concession was on the defence. (vi) That at the conclusion of the prosecution case there was no evidence or no proper evidence before the jury of the terms or boundaries of the said concession, or that the goods had passed beyond such boundaries. (vii) That in ruling on the submissions the assistant recorder was wrong in holding that the evidence (in cross-examination) of Mr. Elliott, the customs officer, that the U.S. ration card issued to servicemen showed that the U.S. authorities, or some U.S. authority forbade disposal of rationed items to non-entitled persons other than immediate relations, was proper evidence of the terms and boundaries of the concession. Mr. Elliott did not produce the ration card. (viii) That in ruling on the submissions the assistant recorder was wrong in holding that there was evidence of "dealing" by the appellant Berry after the goods had become "chargeable", having held that dealing was a wide term including any moving or transporting. (ix) That at the conclusion of the prosecution case there was no evidence of such dealing.

At the hearing of the appeals the following grounds were added. (x) That in ruling on the submissions the assistant recorder was wrong in law in holding that there was no need in this case to decide whether permitted use under the concession included ordinary social use, such as giving a drink to a friend. (xi) That the assistant recorder by ruling as aforesaid and by indicating that he would in due course direct the jury as aforesaid on the law, induced the defence:—(a) to call no evidence on the precise terms of the concession, on the basis that the goods being "chargeable" on entry into England regardless of the concession, any transportation of them in England being a "dealing", the only defence was intent to defraud, and, therefore the only issue was the appellant's knowledge of the boundaries of the concession. (b) to address the jury on the false basis that he would duly direct the jury as aforesaid; and (c) to concede in the final speech that there had been "dealing" by the appellant Berry using the word in the sense of transportation as was previously ruled. (xii) That the assistant recorder did not at any time during or at the conclusion of the final speech intervene to

indicate that he proposed to direct the jury differently to his previous rulings on the meaning of "chargeable" and "dealing", although the final speech was expressly based on the previous rulings, which counsel for the appellants said he was obliged to accept, the assistant recorder having ruled on them. (xiii) That in summing-up to the jury the assistant recorder wrongly directed them that dealing, insofar as the appellant Berry was concerned, meant "knowingly handing on to non-entitled persons" and "handling outside the scope of this concession to U.S. forces", and did not distinguish the new meaning from the meaning previously ruled on, and on the basis of which the defence admission of dealing had been made. (xiv) That in summing-up to the jury, the assistant recorder directed them that goods were not chargeable while under the protection of the concession, entirely contrary to his previous ruling, and without indicating that it was a contrary direction and that the defence had put forward their case and addressed the jury on the basis that he would direct them on the law in accordance with his previous ruling, and had thereby acted to their detriment and been obliged to put forward the issue of intent to defraud as in effect the sole issue. (xv) That in summing-up to the jury, the assistant recorder wrongly told the jury that in effect the real issue was "dealing" and not "intent to defraud". (xvi) That in summing-up to the jury, the assistant recorder wrongly directed the jury that the strict view was that the appellant Berry was outside the concession if he gave goods outside his legal family and that it depended on whether he gave within his household or to a girl friend down the road. (xvii) That there was no evidence that an ordinary social gift to a friend or guest or host was outside the boundaries of the concession, whether made on the U.S. base or in private elsewhere, whereas there was ample and unchallenged evidence from defence witnesses that English girls could go freely to U.S. clubs on the base and have uncustomed drink, that U.S. officers and men habitually and openly entertained Englishmen on the base, including high-ranking police and other officials when uncustomed drink was served and that no objection was taken by any authority thereto, and that U.S. servicemen entertained the English with uncustomed drinks at their homes. (xviii) That in summing-up to the jury, the assistant recorder wrongly indicated to the jury that they could properly infer from the U.S. ration card produced by airman Ball that because it contained a warning against transferring or loaning a ration card other than to a member of an immediate family, it indicated that no rationed goods could be used in any way save by a member of an immediate family, and wrongly failed to remind the jury; (a) of the precise terms of the warning, which was in legalistic language and against purchase for purpose of resale or production of income, transfer or loan of the ration card as aforesaid, and purchase, possession or transportation of unreasonable amounts of rationed goods; (b) of the fact that there was no warning or suggestion against gifts of reasonable amounts of rationed goods to friends socially; (c) of the fact that Mr. Elliott's evidence that the ration card warned against "disposal of rationed items to non-entitled persons other than immediate relations" was the sole evidence of the concession in the prosecution case and was proved to be untrue; (d) of the possibility that the untruth was of importance in judging the reliability of Mr. Elliott's recollection and evidence; (e) of the undisputed evidence of Mr. Ball that the sole warning given to U.S. forces on arrival in England was in the same terms as the ration card; (f) of the undisputed evidence of the appellant Berry that although described officially as a policeman he was in fact an aircraft guard and had no training or experience in legal or ordinary police matters; (g) of the fact that it was a proper implication from the terms of the warning on the ration card that use of rations by U.S. forces included at any rate ordinary

social use with friends, or small gifts to friends, there being no suggestion that the appellant Berry had at any time an unreasonable amount of rationed goods. (xix) That in summing-up to the jury, or otherwise, the assistant recorder in no way commented on the prosecution's opening of law, which was that the prosecution depended on proving a transfer or ownership by gift to the appellant Stewart, or alternatively on a transfer to joint ownership by both appellants and that the U.S. serviceman was not allowed under the terms of the concession to give to a person other than a dependant, and although the assistant recorder adopted the word "dependant" did not define the same, and did not comment on the matters referred to in para. (xi) and para. (xii) above and thereby left the jury in a probable state of confusion as to the law, and in particular as to the terms and boundaries of the concession and their application to the proved facts. (xx) That the verdict of the jury should be set aside on the ground that under all the circumstances of the case it was unsafe or unsatisfactory and/or unreasonable.

The appellant Berry also applied for leave to appeal against sentence on the ground that the sentences were excessive in all the circumstances, in particular his present financial position, his future after conviction, and on a first conviction of any sort. The facts are stated in the judgment of the court.

J. I. Murchie for the appellants.

Paul Wrightson, Q.C., and *P. W. Medd* for the Crown.

Cur. adv. vult.

Dec. 18, 1968. **MILMO, J.**, read this judgment of the court. On 25th September 1967 at Oxford City Quarter Sessions the appellants were each convicted of four offences under s. 304 of the Customs and Excise Act, 1952, namely, being knowingly concerned in dealing with goods which were chargeable with duty which had not been paid, with intent to defraud Her Majesty. The first of these offences related to 960 cigarettes; the second to three bottles of wine; the third to three bottles of whisky; and the fourth to one bottle of gin and two bottles of whisky. The appellant Berry was fined £20 on each of the four counts on which he was convicted and the appellant Stewart was given a conditional discharge and ordered to pay £15 costs. The assistant recorder in the case of each appellant certified that the case was a fit one for an appeal under s. 3 (b) of the Criminal Appeal Act 1907.

The appellant Berry was at all material times an airman serving with the United States Air Force and stationed at Upper Hayford in Oxfordshire. He was a married man and up to 1966 lived with his wife and two children in the neighbouring village of Launton. In September 1966, he parted company with his wife and went to live with the appellant Stewart at a flat at 9, Windrush Towers, Blackbird Leys, Oxford. The two cohabited together at this address until July 1967, when the appellant Berry became reconciled with his wife and returned to live with her at the house where she had continued to reside after his departure and where he had never ceased to maintain her. On 1st March 1967, a customs officer, Mr. Elliott, accompanied by two police officers, called at the appellant Stewart's flat in Blackbird Leys and after telling her who they were, the appellant Stewart invited them to come in, which they did. There was a considerable conflict of evidence between Mr. Elliott and the police officers on the one side, and the appellant Stewart on the other. The evidence for the prosecution was as follows: Mr. Elliott said to her: "I have reason to believe that you are in possession of uncustomed spirits and cigarettes." To this she replied: "No, there is nothing like that here." Having been told by the officer that he was referring to spirits and cigarettes from American servicemen, the appellant Stewart replied: "Yes, I know what you mean. No, I have got nothing. Well, only one packet actually."

She then showed the officer an opened packet of Pall Mall cigarettes containing 13 cigarettes and having on it a blue label stating that the contents were free of duty and for American forces. She said that these cigarettes were hers and that she had got them from her boyfriend who was an American serviceman. She later said that this man was the appellant Berry and the appellant Berry admitted that this was so. After caution she was then asked whether she had in her flat any other spirits or cigarettes from Americans. She said that she had not. At first the appellant Stewart declined to allow the officers to go round the flat in order to see whether her denial was true but, on being shown a writ of assistance under s. 296 of the Customs and Excise Act, 1952, she did not persist in her objection. In the kitchen two bottles labelled "Gipsy Rose wine" were found, one full and the other half full. On being told that this was an American wine sold in large quantities on the U.S. bases, she replied, "All right, he [meaning the appellant Berry] brought me that, but that is the lot." In the lounge there was found an empty bottle of Dubonnet. The appellant Stewart said that this had been brought full to the flat by the appellant Berry together with the bottles of Gipsy Rose wine and that she had been drinking the Dubonnet. There was then found in a cupboard one bottle of Haller's whisky and two bottles of Rocking Chair whisky bearing blue labels showing that the contents had been distilled in the U.S.A. for export. The appellant Stewart was reminded of her earlier answers and admitted she had lied. She was then asked whether she had any other spirits and cigarettes in the flat and she replied, "No". They then went into a bedroom where the appellant Stewart went to a wardrobe from which she removed a hold-all, saying, "Well, there is this as well from him. I may as well be honest with you, I suppose." In the holdall there were four cartons of Pall Mall cigarettes each containing 200. It also contained an opened carton containing loose packets of 20 Pall Mall cigarettes, each packet bearing a label—

"Tax exempt. For use only of United States military or naval forces and other authorised personnel outside the jurisdiction of the internal revenue laws of the United States. This product is admitted free of duty into the United Kingdom."

There was also in the holdall one bottle of "Old Mr. Boston" gin, one bottle of "Barton Reserve" whisky and one bottle of "Belle of Kentucky" whisky. The appellant Stewart told the officers that the cigarettes were for her and for the appellant Berry when he was at the flat. She said that the drink and cigarettes were also for their friends. She was asked how he could afford to let her have all this and her reply was, "It is from his ration". She added that it was bought duty free; that is to say, free of customs duty. She admitted that she was not a British civilian who was entitled to have duty free goods intended for the U.S. forces only.

Later the same day Mr. Elliott interviewed the appellant Berry at the U.S.A.F. establishment at which he was stationed. Once again there was a considerable conflict as to what occurred. Mr. Elliott's version was as follows: At first the appellant Berry, when shown the cigarettes and bottles which had been found in the appellant Stewart's flat, denied that he had taken them there but shortly after admitted that he had done so. He said that the appellant Stewart drank both Gipsy Rose wine and Dubonnet. He admitted that his U.S. ration card stated that disposal of rationed items to non-entitled persons other than immediate relations is prohibited. On being asked why he had supplied the appellant Stewart with all these rationed items, he replied—

"Look, if you have a woman, Russian, Chinese or British, would you go and see her and not take her something each time? . . . you can't go and sleep with a woman and not take her something . . ."

He was then asked whether the cigarettes and drink were "for services rendered" and he replied, "Yes, and for me to drink when I am there, don't forget that". He admitted that the drink and cigarettes marked "For U.S. forces only" and "Free of British customs duty" were taken to the flat of the appellant Stewart who was a non-entitled British national, there to be used as she chose for issue to other non-entitled persons.

The above evidence given for the prosecution has been set out at some length because, although much of it was denied by the appellants, it is clear from the jury's verdict that they rejected these denials and accepted the evidence of the prosecution witnesses. The goods which were the subject-matter of the charges of which the appellants were convicted were those referred to in the aforementioned evidence. It was not disputed that all these goods were of American origin and to the knowledge of the appellants had been imported into the United Kingdom free of duty under an arrangement made between H.M. government and the U.S. government. In the course of his examination-in-chief the appellant Berry said that the drink and cigarettes, the subject-matter of the charges, were for authorised users only. In cross-examination he said that he knew that American servicemen were getting these goods duty free and cheaper than the English were allowed to get them. He said that "authorised users" would include a serviceman's family and people living with him and dependent on him and also certain English personnel employed within the U.S. base, of which the appellant Stewart was not one. He admitted that he knew it would have been wrong of him to have given to the appellant Stewart or to anyone else three bottles of duty free whisky. The appellant Stewart when cross-examined admitted that she knew very well at the time that the officers came to her flat that the customs were very strict about American servicemen giving away liquor and cigarettes.

The current legislation rendering spirits, wines and tobacco liable to customs duties is to be found in s. 1, s. 3 and s. 4 respectively of the Finance Act 1964. In each case the relevant words are: "There shall be charged . . . on [spirits] imported into the United Kingdom duties of customs . . ." Section 304 of the Customs and Excise Act 1952, under which these appellants were charged, provides as follows:

"Without prejudice to any other provision of this Act, if any person—
(a) knowingly and with intent to defraud Her Majesty of any duty payable thereon . . . acquires possession of, or is in any way concerned . . . in any manner dealing with any goods . . . which are chargeable with a duty which has not been paid . . . he . . . shall be liable to a penalty . . ."

Section 307 of this Act is the interpretation section. It contains no definition of the word "chargeable" but defines "dutiable goods" as meaning—

"goods of a class or description subject to any duty of customs or excise, whether or not those goods are in fact chargeable with that duty, and whether or not that duty has been paid thereon."

Section 34 of the same Act provides that:

"(1) Save as permitted by or under the Act or any other enactment relating to customs, no imported goods shall be delivered or removed on importation until the importer has paid . . . any duty chargeable thereon . . ."

Section 79 (2) provides that:

"The time of importation . . . shall be deemed to be—(a) where the goods are brought by sea, the time when the ship carrying them comes within the limits of a port; (b) where the goods are brought by air, the time when the aircraft carrying them lands in the United Kingdom . . ."

It was not suggested on either side that there was any statute which excluded from the provisions of s. 1, s. 3 or s. 4 of the Finance Act 1964 goods covered by the aforementioned arrangement made between H.M. government and the U.S. government. The only other provision of the Customs and Excise Act 1952 to which it is at this stage necessary to refer is s. 290 (2), which provides as follows:

"Where in any proceedings relating to customs or excise any question arises as to the place from which any goods have been brought or as to whether or not—

(a) any duty has been paid or secured in respect of any goods, or

(b) any goods or other things whatsoever are of a description or nature alleged in the information, writ, or other process . . .

then, when those proceedings are brought by . . . the Commissioners . . . or against any other person in respect of anything purporting to have been done . . . under the customs or excise Acts, the burden of proof shall lie upon the other party to the proceedings."

At the conclusion of the case for the prosecution, submissions were made on behalf of the appellants that there was no case to answer and that the case should be withdrawn from the jury. In the course of giving his ruling rejecting those submissions, the learned assistant recorder refused to accept the proposition for which the defence had contended, namely, that the goods were not "goods . . . which are chargeable" within the meaning of s. 304 of the Customs and Excise Act 1952 until they had passed out of the concession made in favour of members of the American forces in the United Kingdom by H.M. government. He said that the fact that the Crown had in respect of certain goods imported for use by the American forces not exacted payment at the moment of import of the duty which would normally be payable in respect of those goods did not alter the basic chargeability of those goods under the relevant sections of the Finance Act 1964. He further held that even if he was wrong on this point and if the goods only became "goods . . . which are chargeable" when the umbrella afforded by the concession had been exceeded, then by reason of the provisions of s. 290 (2) (a) and (b) of the Act of 1952 the onus of proof lay with the defence to show that the goods were not chargeable. In other words, he was saying that it was not for the prosecution to prove that the goods were "chargeable" but for the defence to prove that they were not. In the course of his ruling he also held that the words in s. 304 of the same Act, "in any manner dealing with any goods", were very wide in their scope and that there was *prima facie* evidence of "dealing" with goods which had been admitted free of duty under the concession if it were shown that a person entitled to have such goods under the concession handed them over to a person who was not so entitled. The case then proceeded and evidence, including that of the appellants, was called on behalf of the defence. After counsel for the prosecution had concluded his final address to the jury, the assistant recorder was handed for the first time a copy of the report in the LAW REPORTS of the case of *Schneider v. Dawson* (1) which had been extensively canvassed in the course of the submission that there was no case to answer. This report contained an observation of LORD PARKER, C.J., made in the course of the argument in that case, which was not mentioned in the report which had previously been before the assistant recorder. It reads as follows:

"There is a difference between the wording of Section 304 of the Act of 1952 and section 186 of the Customs Consolidation Act, 1876. Section 304

(1) 124 J.P. 7; [1959] 3 All E.R. 583; [1960] 2 Q.B. 106.



speaks of knowingly dealing with goods which are chargeable with a duty. That does not mean dealing with goods of a class which is dutiable. Before the onus can rest on the appellant the prosecution must show that the goods have passed the stage of being dutiable and have reached the state of being chargeable."

These words of LORD PARKER, C.J., form no part of the judgment of the Divisional Court nor is there anything in the report to suggest that they represent the concluded views of LORD PARKER, C.J., or of any of the other members of the court. It would, however, appear from the opening sentence of the paragraph immediately following that counsel appearing for the Customs and Excise conceded that "the goods are not chargeable while in the possession of the servicemen". If by the word "chargeable" in this context counsel meant no more than that the Crown waived its right to duty so long as the goods remained in the hands of American service personnel, there is no doubt that this was a true statement of the position. If, on the other hand, it meant that as a matter of law the goods were not "goods which are chargeable with a duty" within the meaning of s. 304 of the Act of 1952, it is a question for consideration whether the proposition was well founded.

When one reads the summing-up in the present case, it is evident that the aforementioned observation made by LORD PARKER, C.J., in the course of the argument in *Schneider v. Dawson* (1) caused the assistant recorder to take a different view of the law from that which he had taken in his ruling on the submissions made on behalf of the defence at the end of the case for the prosecution. His consequent direction to the jury as to the law was somewhat more favourable to the defence than his ruling on the submission had been. It is right to add that even if the assistant recorder in his ruling on the submissions had taken the same view of the law as he subsequently took in his summing-up, this court is fully satisfied that the result would have been no different from what it was and the submissions that there was no case to answer would have been rejected.

At this stage it may be convenient to refer to the authorities. The attention of this court was called to a number of cases, the earliest being *A.-G. v. Thornton* (2). The Portuguese ambassador to the Court of St. James at the conclusion of his mission departed from the country, leaving to be sold by auction a quantity of uncustomed goods, namely, wines which he had imported under diplomatic privilege free of customs duty by licence from the Treasury. After the sale the Crown claimed from the auctioneer the duty payable on the wine. The Court of Exchequer held that duty attached to the wines when brought into the country and that, although the duty was not paid at the moment of bringing them in because by special arrangement they were allowed to come in free of duty, the duty was leviable later when the goods came into hands other than those of the person on whom the privilege had been conferred, namely, the ambassador. The next case is that of *M'Queen v. M'Cann* (3), a Scottish case involving goods imported free of duty for use by the American forces but brought under the Customs Consolidation Act 1876, s. 186, which reads as follows:

"Every person who . . . shall knowingly harbour, keep or conceal . . . any . . . uncustomed goods . . . or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties thereon . . . shall for each such offence forfeit [a penalty]."

(1) 124 J.P. 7; [1959] 3 All E.R. 583; [1960] 2 Q.B. 106.

(2) (1824), M'Cle. 600.

(3) 1945 S.C. (J.) 151.

On appeal the Court of Justiciary held, following *A.-G. v. Thornton* (1), that cigarettes which had been allowed to come into this country free of customs duty for use by the American forces were "uncustomed goods" within the meaning of s. 186 of the Act of 1876 when they passed into the hands of the respondent who, not being a member of the U.S. forces, was not a privileged person within the concession. The court was then referred to *R. v. Cohen* (2) which was an appeal to the Court of Criminal Appeal from a conviction, under s. 186 of the Customs Consolidation Act 1876, of knowingly harbouring uncustomed watches and other articles with intent to defraud His Majesty of the duties thereon. For the present purpose, the only relevant passage in the judgment of the court given by LORD GODDARD, C.J., is where he says:

"Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded, but, as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the accused knew, which would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue. There may be cases where the circumstances would negative the intent, but, ordinarily speaking, it is, indeed, difficult to see how it could be found that he did not intend to defraud the revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling, but told lies to the officers when challenged on the matter."

The next case, *Sayce v. Coupe* (3), was also a prosecution under s. 186 of the Act of 1876 and involved cigarettes brought to this country duty free for use of the American forces and sold by members of the American forces to a publican who did not sell any of the cigarettes but used a large number. The justices had held that there was no intent to defraud and dismissed the summons. LORD GODDARD, C.J., in giving the judgment of the Divisional Court on appeal by the prosecution on a Case Stated said:

"I think the justices came to the conclusion that the respondent was a very respectable man of good character. Perhaps they thought that he did not realise that he was defrauding the revenue. That, however, is not an answer to the charge. If people are dealing in this way with uncustomed goods, they defraud the revenue, and that is enough. It may be that there is not the same moral stigma or blame which is attached to many cases of fraud, but a person defrauds the revenue if knowingly and consciously he acts with dutiable goods in such a way that the customs are deprived of the duty."

Finally, there is *Schneider v. Dawson* (4), to which reference has already been made. This was an appeal to the Divisional Court on a Case Stated and like the present case arose out of charges under s. 304 of the Customs and Excise Act 1952, concerning goods allowed into this country free of duty for use by the American forces. The appellant, Schneider, who was not a member of the American forces, had been convicted of knowingly and with intent to defraud Her Majesty of the duty payable thereon having been concerned in (i) keeping, and (ii) dealing with, certain goods, namely, cigars, which were chargeable with a

(1) (1824), M'Clo. 600.

(2) 115 J.P. 91; [1951] 1 All E.R. 203; [1951] 1 K.B. 505.

(3) 116 J.P. 552; [1952] 2 All E.R. 715; [1953] 1 Q.B. 1.

(4) 124 J.P. 7; [1959] 3 All E.R. 583; [1960] 2 Q.B. 106.

duty which had not been paid. The charge of "keeping" related to 45 cigars which the appellant had bought from an American serviceman. The charge of "dealing" related to a further 2,420 cigars which the American serviceman had asked the appellant to look after for him on terms that the appellant might extract whatever number he required for his own purposes and that the American serviceman would call for the remainder, which he told the appellant he intended to sell. The court held that at the time when the appellant bought the 45 cigars from the American serviceman, duty had clearly become payable on them. The court expressly refrained from attempting to give any precise definition of the words in s. 304 "in any manner dealing with" but said that they were very wide and that the appellant's conduct clearly fell within them as regards the 2,420 cigars which he put into his car on the footing that he could buy as many as he wanted and return the balance. ASHWORTH, J., in giving the judgment of the court, said in relation to those 2,420 cigars:

"... the privilege under which the cigars were not dutiable ceased to apply and the goods became chargeable with duty."

In relation to this passage in the judgment it seems improbable that the word "chargeable" was used in precisely the same sense as in s. 304 of the Act of 1952. Certainly the word "dutiable" was used in a different sense from that laid down in s. 307 as above cited. It is also to be observed that in *Schneider's* case (1) the arrangement between the British and American governments under which goods are admitted duty free for use of the American forces in this country was not produced and the stipendiary magistrate had refused to admit oral evidence of its contents. In these circumstances the evidence on which it was held that the privilege had ceased to apply rested on an admission by the appellant, *Schneider*, that American servicemen received imported cigars and that these could be bought more cheaply than elsewhere because they had not borne duty and that he knew that the servicemen were not supposed to sell them.

The grounds of appeal relied on by the appellants were identical. Originally nine grounds were put forward, but by the time of the hearing these had been increased to twenty. They were not dealt with *seriatim* by counsel at the hearing of the appeal and the court does not find it necessary to deal with them separately in this judgment. The first point made on behalf of the appellants was as to the ruling of the assistant recorder on the submissions as to the meaning of the word "chargeable" in s. 304 of the Act of 1952. In the judgment of this court this ruling and the direction given in the summing-up was correct. The word "chargeable", insofar as duties chargeable on imported cigarettes, wines and tobacco are concerned, derives from s. 1, s. 3 and s. 4 of the Finance Act 1964. Goods falling within these descriptions are "goods... which are chargeable" within the meaning of s. 304 of the Act of 1952, and they do not cease to be within this category merely because H.M. Customs and Excise by reason of some concession do not in certain circumstances collect the duty payable on them. It is indeed the pattern of the Act of 1952 that goods which by concession, whether statutory or any other type, do not have the duty on them collected at the moment of importation, normally remain in law chargeable goods despite the concession. That pattern is exemplified by s. 38 and s. 80 (1) (a) of the Act, which relate to goods entered for warehousing and that part of s. 304 which deals with fraudulent removal of goods from warehouses. In this respect the pattern of the Act of 1952 is no different from that of its predecessor. If anything said in *Schneider's* case (1) can properly be construed to the contrary, this court is unable to agree with it—and it is to be noted that that decision does not depend for its validity on the

(1) 124 J.P. 7; [1959] 3 All E.R. 583; [1960] 2 Q.B. 106.

point now under discussion. The concession arrangements by which duty is not collected at the time of import on specified goods intended for use by members of the U.S. forces and certain of their dependants were, as this court was informed, made by a treaty agreement. Such an agreement—unless shown by some statute to be effective to take the goods out of the ambit of s. 1, s. 3 and s. 4 of the Finance Act 1964 (compare s. 34 of the Act of 1952 as already cited earlier in this judgment)—cannot cause those goods to cease to be “chargeable”. It was conceded by counsel on both sides that there is no statutory exemption from customs duties on goods imported into the United Kingdom for use of the American forces stationed here. In the present case no agreement with the U.S. government was put in evidence but having regard to the point conceded by counsel on both sides its terms could have made no difference for whatever the terms of that agreement are, they could not alter the statutory position that the goods in question were “chargeable” with customs duty under the Finance Act 1964.

It was then argued that the assistant recorder was wrong in law in holding that by reason of the words “description or nature” in s. 290 (2) (b) of the Act of 1952, the burden of proof lay with the defence to show that the goods referred to in the indictment were not “chargeable”. In the opinion of this court, the assistant recorder was wrong in so holding and, indeed, counsel for the prosecution did not seek to support this ruling. The error, in the particular circumstances of this case, was of no consequence and did not prejudice the defence in any way. Having regard to the direction given as to the meaning of the word “chargeable” in s. 304 of the Act of 1952 and to its being conceded by the defence that the goods were what they purported to be, namely, whisky, wine and cigarettes, there was no issue of fact to be determined by the jury whether these goods were “chargeable”. As a matter of law they were “chargeable”.

The next point taken on behalf of the appellants was that there was no evidence, or no proper evidence, before the court as to the terms or boundaries of the concession granted to the American forces in this country. It is to be observed that in none of the cases to which reference has been made was the relevant agreement ever put in evidence. Having regard to the view of this court that the goods were at all material times chargeable goods whatever be the terms of the concession, those terms could only be relevant to the issue whether the appellants' dealing with the goods was fraudulent (cf., *R. v. Cohen* (1)). Accordingly, the answer correctly made on behalf of the prosecution to this point was that it was unnecessary to prove what the precise limits of the concession were and that it was sufficient to show that the appellants were well aware that what was done by them was outside the concession, whatever its terms might be. The jury by their verdict had clearly accepted the versions of his interviews with the appellants given by Mr. Elliott in evidence. In the judgment of this court the jury found an intent to defraud on the part of each of the appellants. Before they did so they must have been satisfied that the appellants dealt with the goods in a manner which they knew was outside the concession and not permitted within the concession. There was ample evidence to support this finding.

A further point was taken on behalf of the appellants that in consequence of the rulings given by the assistant recorder on the submissions of no case to answer, rulings which he subsequently modified in his summing-up, counsel were induced to concede in their final speeches that there had been a “dealing” with the goods by the appellants within the meaning of s. 304. The summing-up contains passages which, taken by themselves, are open to criticism, but it must be looked at as a whole. It undoubtedly proceeded on a footing which differed

(1) 115 J.P. 91; [1951] 1 All E.R. 203; [1951] 1 K.B. 505.

from the rulings on the submission but the differences, in the opinion of this court, did not, and could not, have prejudiced the appellants in any way. The issue as to "dealing" could not be divorced from the "intent to defraud". What the prosecution had to prove was a dealing by the appellants with intent to defraud. The assistant recorder directed the jury that they must be satisfied that there was a dealing which was outside the concession. He directed them that the onus lay with the prosecution to prove this and also to prove the intent to defraud. The real issue was whether there was an intent to defraud on the part of the appellants and the summing-up left no room for misunderstanding as to this. Unless the appellants were dealing with the goods in a way in which they knew was not permitted under the concession, there could have been no intent to defraud on their part. The summing-up directed the jury that the onus lay on the prosecution to prove both dealing and intent to defraud. The assistant recorder told the jury that, as to the appellant Berry, the prosecution could not succeed unless they showed that there was dealing with the goods putting them outside the immediate control and use of the appellant Berry and that before they convicted the appellant Stewart they must be satisfied that there was some dealing in which she was involved, namely, that the goods were handed over to her, a non-entitled person, to use as she liked. The court has in mind passages such as:

"And then the final question—intent to defraud. Well, you may think, members of the jury, that this only arises if knowingly the [appellant] is proved to have been using the goods in a way which was outside the concession and he knew he was not entitled to use them."

There is in all the circumstances no good ground for interfering with these convictions. As to the applications for leave to appeal against sentence, no grounds have been advanced for granting leave and the applications are dismissed.

Appeals dismissed.

Solicitors: *Registrar of Criminal Appeals; Solicitor, Customs & Excise.*

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(SIR JOCELYN SIMON, P., AND BAKER, J.)

November 18, 26, December 2, 3, 4, 5, 1968

B. v. B.

Child—Custody—Order by justices—Appeal—Stay of execution.

In matrimonial proceedings for the custody of a child under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, justices, on being informed that an appeal from their decision is intended, should grant a stay of execution unless there are special reasons of urgency justifying a refusal.

Child—Custody—Order by justices—Disobedience by parent—Committal—Appeal to High Court—Hearing by Divisional Court of Probate, Divorce and Admiralty Division—Power of justices to suspend committal order—Permissible period of imprisonment.

By s. 13 (1) of the Administration of Justice Act, 1960: "... an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court..." Under s. 13 (2) (a) an appeal from justices lies to a Divisional Court of the High Court. The High Court, therefore,

has jurisdiction to hear an appeal from an order of justices committing the parent of a child to prison under s. 54 (3) of the Magistrates' Courts Act, 1952, for disobedience to an order made in matrimonial proceedings relating to the custody of a child, and under R.S.C., Ord. 109, r. 2 (2), this appeal is heard by a Divisional Court of the Probate, Divorce and Admiralty Division.

Justices have no power under s. 39 of the Criminal Justice Act, 1967, to suspend such a sentence of imprisonment. Nor have they power to commit a person to prison for a fixed period; the proper order is to commit the person to prison until he obeys the order which he has disobeyed.

APPEAL by the father of a child against orders made by Gravesend justices refusing to transfer custody of the two children of the marriage from the mother to him, varying an access order which had been made in his favour, committing him to prison for two months for contempt of court in acting in breach of an order giving custody to the mother, and refusing a stay of execution.

K. Bruce Campbell, Q.C., and M. A. Thorpe for the father.

T. A. C. Coningsby for the mother.

SIR JOCELYN SIMON, P.: This is an appeal by a husband and father against orders which the Gravesend justices made on 14th November 1968. So far as is relevant to this appeal, they made four decisions which are in question. First, they refused to transfer the custody of two children of the marriage, a boy aged nine years and a girl almost five, from the mother to the father. Secondly, they varied a previous access order which had been made in favour of the father, so as to deny him access to the children over Christmas, 1968. Thirdly, they committed the father to prison for two months for contempt of court in acting in breach of a previous order of the court giving custody to the mother and strictly delimiting access to the father. (However, they purported to suspend that sentence under the Criminal Justice Act 1967.) Fourthly, they refused a stay of execution, on the ground that they had no power to grant it. I think it must have been clear that the stay they were being asked to grant, and which they were saying they had no power to grant, was as to the handing over of the older child, who was at the time in the hands of the father in breach of the order of the court. It is obvious from what I have said even so far that we are concerned here with matters of great importance, involving the liberty of the subject and the welfare of children, and the appeal has been argued with appropriate care and copiousness.

In the exercise of our powers under the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, we heard part of the appeal—namely, that primarily relating to the custody and welfare of the children—in closed court, on the ground that it could not be in the interests of the children to have such matters ventilated in public. Other parts of the appeal—namely, those relating to the liberty of the subject—we heard in open court. But for the purpose of giving judgment it is not really possible to separate the two parts of the case. We are giving judgment in open court because questions affecting the liberty of the subject are involved and because some important questions of law and practice arise. However, we ask that any report that may be made of our judgments may be made in such a form that the children cannot be identified.

It is a more than ordinarily sad case even in the run of such cases, if only because these are exceptionally gifted children. The boy has already proved his superior ability. The girl shows every sign of following in the same way. There is no reason to doubt that both parents are devoted to these children. Indeed, there is sometimes a danger in this kind of case, where a marriage has foundered, that a parent should seek over-compensation in an obsessional devotion; and I fear that there are signs of that in the instant case.

There is one other preliminary matter which I should like to deal with. At a fairly advanced stage of this appeal the father, who had launched the appeal, applied that we should adjourn it. The application was on the ground that he intended to petition for divorce in the second half of next month and that a High Court judge would then have jurisdiction in custody, it being part of the father's case that he had reasonably lost confidence in the bench of magistrates from whose decision the appeal is brought. It was implicit in his application for an adjournment that he should keep the boy meanwhile. It seemed to us, however, that the overriding consideration was to arrive as early as possible at some final conclusion (so far as one can in cases of this sort). I am convinced that this is in the interests of the children, particularly the boy. I think that it is also in the interests of the parents, not least the father.

I have indicated that, when marriages break down, it frequently and naturally happens that each parent feels very strongly that he or she is the better person to care for the children and that the other parent is unsuitable. That is partly based on a laudable sentiment of parental love, though it is sometimes coloured by less worthy sentiments. It, therefore, frequently happens that the views of the parents are quite irreconcilable. Unless there is an impartial arbitrament in those circumstances—if each parent is, so to speak, allowed to take the law into his or her own hands—a struggle arises of which the child is the object. At the best, the child is then subject to conflicting strains; at the worst, the child is shuttled backwards and forwards between the parents in an atmosphere of violence and disorder. At the very least, therefore, it is liable to cause harm to the child. Moreover, a parent who feels very strongly in such a situation may not be able to consider with the necessary objectivity what is in the real interests of the child. It is in order to avoid those evils that Parliament or our ancient law has confided to various tribunals the anxious duty of adjudicating on such matters. It is a peculiar type of adjudication. Neither parent has a paramount right, which, on proof of certain facts, entitles him or her to judgment. The decision is, in other words, what is known to the law as a discretionary one. There are almost always a number of conflicting considerations. All that the law says is that the tribunal charged with adjudication shall take as its first and paramount consideration the welfare of the child. That is easy to state; it is often very much less easy to determine. Obviously, in general it is best for a child to live with two parents cohabiting in harmony. In the situation which I have described that is not possible; and the court has to choose which of the two parental households is better in the circumstances; even though sometimes, though happily rarely, it means the choice of the lesser of two evils. The decision of the court is often difficult of acceptance by the parent whose views are not preferred. Since all courts are manned by human beings and therefore liable to error, Parliament has erected a hierarchy of appellate courts to ensure, so far as is humanly possible, that the discretion given to the court of original jurisdiction has not been wrongly exercised. However, that function of an appellate court is, as I shall indicate later, different from where the judgment is given in the court below as a matter of right and not as a matter of discretion.

I said that it is often difficult for the parent whose views are not preferred to accept the decision of the court even of impartial arbitrament. Nevertheless, it is of vital importance in the interests of the child that he or she should do so. Otherwise, one is back again at the situation where each parent tends to take the law into his or her own hands, with the evils that I have described; in other words, is acting in a way which is inconsistent with putting the child's welfare as the first and paramount consideration. The child then is subjected again to

conflicting strains and stresses, to conflicts of loyalty and attachment, and is placed in a situation inconsistent with the steady tenor of its life. It is essential, therefore, that the decision of the court, even though it may be unpalatable, should be accepted and respected. It is for that reason that the courts are given various penal powers to ensure that their orders are carried out. That is particularly important, of course, in respect of children. The observance of the order of the court affects not only the welfare of the child with which the court is instantly concerned, but also the welfare of any other child who has been or might be the subject-matter of decision by the courts. Unless the courts' judgments are generally respected, those children, too, will suffer; because it will appear that a judgment of the court can be flouted with impunity if a parent dislikes it. It is for that reason, I have no doubt, that the Gravesend justices, on being satisfied that the father had acted in breach of its order, felt that he merited severe punishment in the form of a sentence of imprisonment. It remains to consider, of course, what power the court had to act in that way; and, if it had no such power, whether we ourselves have power to punish the father for disobedience of the order of the court below and should do so.

I now turn to give an outline of the events of this case. The parents were married on 5th August 1957. Latterly they lived at Gravesend, in a house which the father now occupies and which he is buying on mortgage. On 28th September 1959 the elder child, M., was born. The younger child, a girl, H., was born on 12th December 1963. The mother left the father on 17th January 1966, and that departure started a separation which has never been terminated. She took the children with her. She went initially to stay with her mother in Wales. But shortly thereafter she went to Brighton with M., where she took employment as a school teacher. She left H. with her mother in Wales for what proved, I think, to be the best part of a year. In the meantime, there was the inception of a long series of proceedings between the parties. The mother took out a summons, complaining that the father had treated her with persistent cruelty, had deserted her and was guilty of wilful neglect to maintain her and the children. I surmise that those complaints really turned on the one issue of persistent cruelty, since it was the mother who had left. They came before the Gravesend justices on 10th March 1966, when all were found proved. The court made no separation order, but gave the custody of both children to the mother and made a maintenance order for the support of herself and each child. Since then there have been many applications to the court to vary the original order. I think that no less than five have been made by the father to vary the custody provision. There have also been applications to vary access provisions, to vary maintenance and to remit arrears. Each party has also taken proceedings to commit the other to prison for disobedience of the order of the court.

I need not go through that distressing history in detail. It is set out in an affidavit which we requested from the clerk of the Gravesend justices, who has exhibited the various documents which came into being in the course of litigation. I shall go straight to an order of 7th March 1968, when the Gravesend justices varied the original order, not for the first time, in order to delimit very carefully the father's right of access. The order of 7th March 1968 adjudged that the custody of both children should remain vested in the mother, but that the father should have access to, and care and control of, the two children—and then it sets out in para. (a) to para. (f) provisions for such access and care and control:

“(a) during the whole of the school half-term during the Easter school term; (b) for ten days during the Easter school holidays; (c) for ten days during the half-term of the summer school term; (d) [and this is important]

for 18 days during the summer school holidays; (e) for seven days during the half-term of the autumn school term; and (f) for seven days during the Christmas school holidays, these seven days to include December 24th, 25th and 26th in the years 1968 and 1969, and thereafter such three days to be included in the seven days on odd numbered years."

In other words, alternate Christmas festivals to each parent, except for 1968 and 1969, when the children were to go to the father, since he had not had them during the two previous Christmasses. The order went on to stipulate that during the aforesaid periods the children should be delivered by the mother to the father's home at Gravesend or his mother's home at Rye on the first day of each such period at her expense, and that on the last day of each such period the father should deliver the children to the mother's home at Brighton at his expense. The order also remitted arrears of maintenance; but it is the custody and access provisions which are important on this appeal.

In my view, the justices acted with great wisdom, in the light of the history of this case, in delimiting so exactly the periods and methods of access. The access so delimited seems to have worked up to the summer holidays. At some time during the summer of 1968 the father apparently contemplated proceedings under the Guardianship of Infants Acts; but I think that the next important document in date is a letter written by the father to the mother on 17th July 1968. It reads in this way:

"Dear [P.]: Re Children: I have received a letter from [M.], asking if he could spend the whole of the holidays with me and I would be pleased if you would accordingly deliver *BOTH* children to me at Rye on Friday, 26th July, as near to 6.30 p.m. as convenient. I would stress that I will firmly resist any suggestion that the children should be separated during the holiday."

So far as I can ascertain, no such suggestion had been made. The children were duly delivered by the mother to the father at Rye on 26th July 1968, as requested by him. But she had not consented in the meantime to M. spending the whole of the holiday with the father, still less that both children should do so. I think that the children should have been returned on about 10th August; but there seems to have been an extension by agreement between the parents, or at least by acquiescence of the mother; and since (for reasons that I will come to later) I think that we ought to assume everything that we can in favour of the father and since there has been no finding of fact by the justices on this matter, all I need say is that on 17th and 18th August 1968 there were communications between the father and the mother relating to the return of the children. The upshot was that the father would not have to bring the children to Brighton, as he was bound to do by the justices' order of 7th March, but would hand them over on 18th August at Rye, where the mother would meet him and the children. On 18th August 1968 the father did take both children to Rye. He says that H. was reluctant to go to the mother; but, so far as I can see, that rests on his statement alone. She was, in fact, handed over to the mother; but M. ran away. The father relies on that strongly in his favour as showing a very powerful disposition on the part of M. to live with him rather than with the mother. On the other hand, little boys of nine do not ordinarily run away from their mothers unless they are consciously or unconsciously influenced. It is not in any way alleged, that I can see, that the mother is a bad mother; merely that the father is the better parent to have custody. I confess that I cannot, therefore, take it in favour of the father that M. ran away on 18th August 1968; rather the contrary.

In the result, however, the mother agreed that the father should keep M. until the end of the school holidays. There can have been no doubt what was meant by that. It must have meant the holidays from the school at Brighton that M. had been attending. The Michaelmas or autumn term there started on 3rd September 1968; and it appears that, shortly before that, the mother requested the father to hand M. over in time to start his term at Brighton. The father failed to comply. He attempted instead to enter M. at his former school at Gravesend. The school authorities there apparently demurred unless the court order was varied. I surmise that it was partly at least in consequence of that that the next event occurred, as to which I am still by no means clear. But I think that on 5th September 1968 the father applied to a Vacation Court of the High Court. Whether that was COOKE, J., sitting in chambers or a Vacation Divisional Court is left in doubt; but I do not think that it matters, since whatever court it was made no order, but merely advised the father to go back to the justices.

There then ensued some correspondence which I ought to refer to. It starts on 27th September 1968. The mother's solicitors wrote to the father at Gravesend, with a copy of the letter to the Rye address, alleging that he was detaining M. beyond the permitted period of summer access and saying that M. must be returned by Wednesday, 2nd October, and "unless that is done, proceedings will be taken against you in connection with your failure to comply with the court order". The father replied the following day, saying:

"I am in receipt of your threatening letter. De facto custody of [M.] is being retained with the approval of the Gravesend justices following an application for summonses against my wife in respect of both children. It is not considered that there is any breach of the terms of the court order on my part and your reference to a previous breach is inaccurate and may be libellous."

The father's reference to de facto custody being retained with the approval of the Gravesend justices arises out of an episode which is left very obscure. The father seems to have gone before a single justice at Gravesend in order to make a complaint, seeking for the custody of both children and to have an interim order in the meantime. That is dealt with in para. 26 onwards of the clerk's affidavit. In spite of the clerk's efforts to disabuse him of the idea, the father seems to have been convinced that on 11th September 1968 he had been granted an interim order giving him the custody of M. pending the hearing of his complaint for a variation of the custody order of 7th March 1968. The father wrote on 8th October to the mother a letter which contains this passage:

"I think the time has now come for [H.] to join [M.] at Gravesend. I certainly do not want any further regression to occur to her in Brighton. I would be pleased if you would make arrangements for her to come to join [M.] in Gravesend permanently, where you know she will be very well looked after. It would mean your releasing the custody of [H.] in the next seven days."

Quite plainly, what the father was demanding was the transfer of permanent custody of both children to him with the mother's consent. H.'s half-term started on 26th October; and not surprisingly the mother did not send her to the father for the period of access which was due then under the order of 7th March 1968. The matter, however, came before the justices on 14th November, when they made the order which is appealed from. The proceedings started by the chairman of the bench reading out a prepared statement, which runs in these terms:

"Mr. [B.]: I have sat on at least three previous occasions as Chairman of a court in which you have been involved in somewhat similar proceedings

as this and what I am about to say is based upon my judicial knowledge, which, as you are no doubt aware, I am entitled to have and to take into consideration. On at least two previous occasions I urged you most strongly to be legally represented and I note again today that you are proposing to represent yourself. Because in the past you have been unrepresented, my colleagues and I have permitted you considerable latitude. It is only fair to tell you, however, that today I propose with the agreement of my colleagues to insist that, as you are conducting your own case, you will accept the court's proper directions on what is admissible or not. I have given instructions that the whole of these proceedings are to be recorded and for this purpose a court shorthand writer is present. It will not be necessary for you, therefore, to continually interrupt the court by asking for a particular point to be noted. This in fact on my instructions is being done. With respect to your application for a variation of the previous order you can only bring before the court any matter in support of this where a situation has altered since the granting of the last order. I do not, with the agreement of my colleagues, propose to permit any discussion or evidence on whether or not the order granted was a proper one. This, as you are well aware, is a matter for another court. Finally, our learned Clerk, my colleagues and I have been subjected by you from time to time with threats of High Court and other legal action. I feel it proper for me to observe, both in your interests and in fairness to your wife and her solicitor, that any decision that my colleagues and I may reach today is totally unaffected by any such threats. I am directing that a copy of what I have said shall be filed in the court papers."

The justices, as I have indicated, refused to vary the custody order, varied the access order so as to deprive the father of access to the children at Christmas time, ordered the father to go to prison for two months for breach of the terms of the order (by which they meant the order of 7th March 1968), suspending that sentence of imprisonment for 12 months, and refused a stay of execution. In their reasons, however, they say:

"We consider we have no power to make such an order [that is, stay of execution] but did indicate that, failing directions from a higher court, we would deem [the father] to have complied with the order if the boy was returned to the custody of his mother by 6 p.m. on Tuesday, 19th November 1968."

In those circumstances, on 18th November 1968 the father, still retaining the custody of the boy, made in person an *ex parte* application to this court. What he sought then was mainly a stay of execution. Since the mother was not present, the order that we made was to adjourn the application for seven days, ordering a stay of execution in the meantime as to the handing over of M. and as to any sentence of imprisonment; in other words, no warrant was to issue in the meantime. We also ordered a welfare officer's report. The main reason for that was that the only document which we had before us on 18th November was a long affidavit sworn by the father on 5th November. I am still not clear for what purposes that was sworn. It is headed, "In the Queen's Bench Division", and it left a number of matters most obscure. However that might be, we could not, we thought, grant a stay of execution beyond seven days without knowing more about what was happening to this boy. We directed that notice was to be given to the mother of the hearing the following week and that the father was to see the legal aid authorities with a view to an emergency certificate, informing the legal aid authorities that we would be assisted by the grant of such a certificate. We also ordered that all relevant orders of the Gravesend and Brighton justices

should be produced at the adjourned hearing. The matter came before us again on 26th November, but we heard no more than a preliminary argument from counsel for the father, the legal aid authorities having in the meantime granted a certificate. We ordered the stay of execution to continue pending the hearing of the appeal, which we said should be before the end of the following week. We ordered the parents not to discuss the matter in any way with either child and gave leave for the notice of appeal to be amended. We also directed that the welfare officer's report should be supplemented by school reports. The matter then came before us on Monday, 2nd December.

I deal first with what seems to me to be the easiest issue in this case, namely, whether the justices had power to grant a stay of execution. Counsel for the mother told us that, in his experience, the present case is by no means unique in demonstrating a misapprehension or uncertainty by justices as to their power to grant a stay of execution in circumstances such as these, because no statute refers to the matter specifically. But, in my view, the matter is put beyond any doubt by the decision of ROXBURGH, J., in *Re S. (an infant)* (1). He held that, unless there were special reasons of urgency for effecting the change of custody, the court, on being apprised that an appeal was intended, should grant a stay of execution. It is true that the decision was made under the Guardianship of Infants Acts. But, in my view, exactly the same reasoning applies to appeals under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. I think that the justices in fact tried, in spite of their misapprehension as to their powers, to grant a stay of execution. What should be done in these circumstances, in my view, is to put a party who indicates an intention to appeal on terms; to direct, say, that execution shall be stayed provided notice of appeal is given within so many days. Of course, the justices are not bound to grant a stay of execution, even on terms; but they have power to grant one. They should consider the welfare of the child, in particular the disadvantage of a double change of custody if their decision should be reversed. In my view, the justices should have granted a stay of execution in this case. No harm was done in the event by their refusal, because they held up the issue of the warrant of imprisonment and in the meantime we ourselves ordered a stay of execution.

That brings me to the second point in this case, namely, were the justices acting within their powers in sending the father to prison for two months, suspending that sentence for one year? The memorandum of the order in the court register reads that the "Name of the complainant" was [the mother]; the "Defendant" was [the father]; the "Offence or Matter of Complaint" was "Disobedience of court order"; and the "Minute of Adjudication", "Committed two months Suspended one year". The justices have explained in their reasons what they were trying to do. They say,

"Finally, we were satisfied that the [father's] failure to return the boy to his mother in accordance with the terms of the order [that is, the order of 7th March 1968] subjected him to a penalty under section 54 (3) of the Magistrates' Courts Act 1952, and we imposed a term of imprisonment of two months which we suspended for twelve months."

Section 54 (3) of the Act of 1952 provides:

"Where any person disobeys an order of a magistrates' court . . . to do anything other than the payment of money or to abstain from doing anything, the court may— . . . (b) commit him to custody until he has remedied his default: Provided that a person shall not by virtue of this section be . . .

(1) [1958] 1 All E.R. 783.

committed for more than two months in all for disobeying one or more orders to do or abstain from doing the same thing."

The first question that arose on this part of the appeal was as to our jurisdiction to review an order purporting to be made under this section. Counsel for the father put it in three ways. He said, first, that we had power under the Administration of Justice Act 1960, s. 13. But that Act and that section seem to presuppose rules indicating which court had jurisdiction, which he could not at the time identify. So he went on to put this part of his case in two alternative ways. He said that we have also jurisdiction under s. 11 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. Thirdly, he said, we could, as a Divisional Court, make an order of certiorari.

I am not going to spend much time on this part of the case, because I am quite satisfied that the first ground for invoking the jurisdiction of this court is the right one. As for certiorari, it involved arguing that R.S.C., Ord. 53, r. 1, and its second paragraph in particular, is *ultra vires* the Supreme Court of Judicature (Consolidation) Act 1925. The rule states that an application for certiorari shall be made in the Queen's Bench Division. Counsel was unable to point to any writ or order of certiorari having been granted by any court other than the Court of Queen's or King's Bench or the Queen's Bench Division. I am quite satisfied that that rule is not *ultra vires* the Act of 1925, and that this court has no jurisdiction in certiorari.

The second ground on which jurisdiction was invoked is not so clear. Section 11 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 allows an appeal to this court against the making of, or against the refusal to make, "a matrimonial order". It was argued that an order under s. 54 (3) of the Act of 1952 was, in the circumstances of this case, "a matrimonial order". I think that such a construction is arguable; but it is unnecessary to come to any conclusion on the point, because I am quite satisfied that we have jurisdiction under s. 13 (1) of the Administration of Justice Act 1960. That provides:

"Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court . . .";

and s. 13 (2) (a) provides that the appeal shall lie "to a Divisional Court of the High Court". The question, therefore, is to which Divisional Court the appeal should lie. The answer appears from R.S.C., Ord. 109, r. 2 (2), which provides:

"An appeal under the said s. 13 from an order or decision of a magistrates' court under s. 54 (3) of the Magistrates' Courts Act, 1952, shall be heard and determined—(a) where the order or decision was made to enforce an order of such a court under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, by a Divisional Court of the Probate, Divorce and Admiralty Division . . ."

That makes it clear, in my view, that an appeal from an order made under s. 54 (3) of the Act of 1952 lies to this court where the order was (as here) made to enforce an order (such as a custody order) under the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

The next question is, assuming there was power to send the father to prison for two months, whether there was any power to suspend that sentence. The magistrates purported to be acting under the Criminal Justice Act 1967, s. 39, which deals with suspended sentences. It is sufficient to say that there are clear indications that that does not apply to a sentence of imprisonment for civil contempt of court. In the first place, the section occurs in a Criminal Justice Act. In the

second place, there are a number of provisions in s. 39 itself which are only appropriate to criminal proceedings and which are quite inappropriate to a sentence of imprisonment for a civil contempt of court: see also *R. v. O'Keefe* (1). In my view, therefore, the justices had no power to suspend any sentence of imprisonment which they may have imposed. Their purported suspension for one year was a nullity. The only portion of this part of their order which could have any effect was, therefore, the order for committal for two months.

I turn, then, to consider whether they had any power to make such an order. It is now accepted that the High Court has power to commit for a definite as well as for an indefinite period. Justices have only the power that is given to them by s. 54 (3) of the Act of 1952. This is a penal provision and, therefore, must be construed strictly. What the justices could have done was to commit the father to custody until he had remedied his default, such imprisonment not to exceed two months. They had no power, in my view, to commit him to prison for two months. If they wished to invoke the section, the proper order would have been to commit the father to prison until he caused M. to be handed over to the mother at a specified time and place, such imprisonment not to exceed two months (or such lesser period as might appear to be justified). In my view, therefore, the father is entitled to succeed on this part of the appeal, and the order of the justices purporting to send him to prison for two months, suspended for twelve months, must be set aside for two reasons: first, they had no power to suspend the sentence; and secondly, they had no power to impose a sentence of imprisonment for two months. However, by R.S.C., Ord. 55, r. 7 (5), this court

"may give any judgment or decision or make any order which ought to have been given or made by the court [appealed from] . . ."

In other words, we ourselves may make the order which the justices unquestionably tried to make, an order punishing the father for contempt of court. I will consider later whether he was in fact in contempt and, if so, whether we should exercise such power. But before I do that I want to deal with the issue of custody, which, as often in these cases, is an anxious and difficult question.

The first point I think we have to consider is this. There is before us material which was not before the justices—the welfare officer's report and the school reports. We have been asked to look at it; in particular, we were asked by counsel for the father to look at the welfare officer's report. Reliance was placed on *Corbett v. Corbett* (2). I do not think, speaking for myself, that that case concludes the matter. It merely indicates that a court exercising an original jurisdiction in custody ancillary to divorce is not excluded from looking at new material which might have been obtained by reasonable diligence at the earlier hearing of the divorce petition, since in custody the consideration of the welfare of the child overrides the consideration that fresh evidence is normally excluded in the interest of finality in litigation. That case only applies on the face of it to the court exercising the original jurisdiction in custody; it is not in itself authority entitling an appellate court to look at material that was not before the court below. On the other hand, this court has on a number of occasions ordered an up-to-date welfare officer's report in custody appeals where we thought the situation might have changed materially since the hearing before the magistrates. We have done that so as to save expense, so that the matter could be disposed of, and in view of the fact that the paramount consideration in these matters is the welfare of the child. I am very reluctant to say that this court may not in a custody appeal look at material which was not before the court below. It is unnecessary to

(1) Ante p. 160.

(2) [1953] 2 All E.R. 69; [1953] P. 205.

determine the question on this appeal, because both sides have been willing that we should look at the new material and it is in the interest of the children that we should do so.

In my view, various parts of the new evidence weigh in contrary directions. The report of the welfare officer reinforces the father's case that this boy is strongly attached to him, is most reluctant to leave him and is getting on very well at his Gravesend school. It also contains one other very cogent matter, and that is that the headmaster of the Gravesend school regards it as an overriding consideration that a decision should be come to in this matter. The school reports throw a rather different light. It is quite true that the Gravesend report shows that the boy is doing very well there; but the Brighton report shows that the boy was also doing extremely well there. There is certainly nothing to suggest that he was unhappy there, as the father avers; there is every indication that he was making extraordinarily good progress, which is rare when a child is unhappy at school. In view of the matter which I shall have to refer to later, this seems to me essentially a case where we should not shut our eyes to anything material which has been laid before us; and I have taken into account what was said by the welfare officer and what appears from the school reports.

The second preliminary matter I must deal with is what is the proper attitude of an appellate court to a court which is exercising a discretionary jurisdiction. Some of the decisions in the Court of Appeal on this question are not entirely easy to reconcile. But, in my view, the matter is stated authoritatively in the speech of VISCOUNT SIMON, L.C., in *Blunt v. Blunt* (1), with which the other learned Law Lords agreed. LORD SIMON said:

"This brings me to a consideration of the circumstances in which an appeal may be successfully brought against the exercise of the Divorce Court's discretion. If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials. But, as was recently pointed out in this House in another connection in *Charles Osenton & Co. v. Johnston* (2): 'The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified'. *Osenton's* case (2) was one in which the discretion being exercised was that of deciding whether an action should be tried by an official referee, and the material for forming a conclusion was entirely documentary and was thus equally available to the appellate court. The reason for not interfering, save in the most extreme cases, with the judge's decision under the Matrimonial Causes Act, 1937, s. 4, is of a far stronger character, for the proper exercise of the discretion in such a matter [and I emphasise these following words] largely depends on the observation of witnesses and on a deduction as to matrimonial relations and future prospects which can best be made at the trial."

(1) [1943] 2 All E.R. 76; [1943] A.C. 517.

(2) [1941] 2 All E.R. 245; [1942] A.C. 130.

The justices here relied strongly on the impression that they had formed from seeing and hearing the parents.

It is said, however, that we can reverse even the discretionary decision in this case for a number of reasons. It is said, in the first place, that the justices' reasons for their decision on custody are vitiated by two matters. The first is that they say—

“The ultimate choice, therefore, was either the day to day care of the children being undertaken by their mother or a housekeeper. We preferred their mother.”

The objection raised to that was that the mother herself has to work, whereas the father is not himself working at the moment; but obviously the justices were right when they said that, he being a young and apparently fit man, “we could not assume that [the father] would for ever receive Social Security”. It would be in his own interest and clearly in the interests of the children that he should work. His mother, who seems to have given her evidence very fairly, would be available for a matter of months, but after that it would indeed be a question of a housekeeper. On the other hand, the mother being a school teacher, her hours of work and her holidays coincide with those of the children. In my opinion, therefore, there is no criticism which is validly to be levelled against that reason of the justices.

The other matter of which complaint is made is that the justices said that there had been no material change of circumstances since the March order confiding custody to the mother. It is said that that must be wrong. In the first place, the boy was growing older; in the second place, he had demonstrated in the most significant way on 18th August 1968 his preference for the father. I have already indicated my view as to that episode. The justices had clearly in mind the happy relationship between the boy and the father. They say expressly—

“We appreciated that the boy was happy with his father, but did not accept that he was therefore unhappy with his mother.”

They could hardly have failed to appreciate that in an interval of eight months a boy becomes eight months older. In my view, therefore, there is no substance in either of the criticisms which are levelled against the reasons given by the justices for their decision on custody and I personally agree with them.

But another very forceful argument was advanced, especially in the final speech of counsel for the father. He argued that the decision—indeed, the whole of the adjudication—was vitiated by the preliminary statement read out by the chairman. That showed, it was said, that the bench was biased; the justices had been “conditioned” by a preliminary discussion with the chairman and were, therefore, incapable of giving an impartial and satisfactory adjudication. In this respect, reliance was placed on *Brinkley v. Brinkley* (1); but, in my view, that was quite a different case from this. There the justices had considered a piece of evidence without the knowledge of one of the parties. Here I can see nothing to suggest that the justices acted on any evidence other than that which was given before them on 14th November 1968.

I am bound to say, though, that I think that the statement that was read out could have been more happily phrased; and it provides the foundation of the last argument to which I wish to refer. It is said that the justices wrongly excluded by that statement evidence of all that happened before 7th March 1968. In my judgment, it was clearly open to the chairman to say, “We are not going to allow

you to challenge the original order made (that of 10th March 1966) or any variation of it (including that of 7th March 1968)". But I think that what the chairman did say is open to the construction that the father was not to be allowed to give evidence of anything that happened before March 1968. Such a ruling would be wrong. In custody disputes later events can only be judged in the light of what has gone before; and no relevant fact can be excluded merely because it occurred before a previous decision.

It is for that reason that we have looked carefully at all the material in this case and have especially considered the matters that were urged on us as relevant which occurred before March 1968. That is one of the reasons why we have thought it right to look at the new material placed before us. It is also why we have, as I have indicated, resolved any matter of doubt in favour of the father. By the new R.S.C., Ord. 112, r. 6 (7),

"The court shall not be bound to allow the appeal on the ground merely of misdirection or improper reception or rejection of evidence unless, in the opinion of the court, substantial wrong or miscarriage of justice has been thereby occasioned."

I think that a ruling that no evidence was to be adduced as to matters taking place before March 1968 would be a misdirection. In fact, a good deal of evidence as to what occurred before that date was adduced; and we have, as I have said, considered the other matters urged on behalf of the father. But, applying that rule, I am quite satisfied that no substantial wrong or miscarriage of justice has occurred here. Having gone into the whole of the matter, not only am I not satisfied that the justices exercised their discretion wrongly, but, in my view, they came to the right conclusion in this case.

I am aware that that decision is bound to be very painful to the father. That has bearing on when the boy should be handed over to the custody of his mother, with whom he should be and should have been for many months now. It is a disadvantage, of course, to interrupt his school term when he is doing so well. On the other hand, we are very near the end of the term, and to prolong the period in which he stays with the father seems to me merely to prolong the agony of both father and child—since the father's feelings are bound to be communicated to the child. I, therefore, would be in favour of the earliest possible hand-over of the child. Although this is a matter on which we should hear counsel, I am myself inclined at the moment to think that the child should be handed over at Gravesend tomorrow evening after school, the mother collecting the child, with, if possible, the local welfare officer and a school authority co-operating. That involves that there should be no access to the children over the Christmas holidays. I think the justices' reasons for that were soundly based; M. must be allowed to settle down in his new environment.

I come back, then, finally to deal with the matter that I left over for consideration, namely, whether we should ourselves impose a sentence of imprisonment for the father's contempt of court. The first question is whether he has in fact committed a contempt—whether he disobeyed an order of the magistrates' court. I am in no doubt that he did. An order for custody vests the right to possession of the child in the person to whom custody is vouchsafed. An order for access derogates from that right only so far as the order for access operates. Insofar, therefore, as a person with right only to access retains the child in excess of the period for access, he or she is disobeying the order of the court. That seems to me not only to be founded on manifest principle, but also to appear from *Mozley Stark v. Mozley Stark and Hutchins* (1), where SIR HERBERT COZENS-HARDY,

M.R., was giving the judgment of the Court of Appeal. In my view, therefore, the father has committed a contempt of court, and has thereby rendered himself liable to punishment under s. 54 (3) of the Act of 1952.

The ultimate question, therefore, arises whether we should in our discretion exercise the power which could have been exercised by the court below, and send the father to prison pending his remedying his default, such sentence not to exceed two months. What is there to be said against this course? First, the father does appear to have convinced himself that he had an order for interim custody. Secondly, since I am prepared to assume in his favour any matter on which fact has not been found against him, I am prepared in this part of the case to assume (what I do not think to be established) that the mother has made difficulties over access. But I do not think that it would be right to take in his favour that the mother denied him access to H. at the end of October 1968. It seems to me, in view of the father's letter of 8th October, that she could hardly be expected to take any other course than that which she did. But, thirdly, I fear that the decision of this court is bound in itself to cause the father such pain that it is itself almost to be considered a punishment. It would be of no advantage to the children to send their father to prison; though that cannot in itself be a conclusive consideration, since punishment for contempt in these cases is designed for the maintenance of the authority of the court in the interests of children generally. But, although I have felt some doubts about this, in the end it seems to me that it is not necessary to send the father to prison.

In the result, in my judgment, this appeal ought to succeed to the extent of setting aside the order of imprisonment, but should otherwise be dismissed.

BAKER, J.: I entirely agree. I would add only two short sentences of my own. One cogent reason why I think that it is not necessary or indeed desirable at this stage to pass any sentence of imprisonment on the father is that it is accepted that he was under the belief, albeit the mistaken belief, that he had an interim order giving him the custody of M.

The second matter is this. To my mind there are four very compelling reasons in addition to those already mentioned by Sir Jocelyn Simon, P., why the justices were right in leaving custody of the children with the mother. They are these. First the father said in the course of his evidence, "These children must not be separated". Later he said, "To split them would be a disaster". I cannot for myself see how it can be seriously argued that the girl, H., should be with the father in preference to the mother, and for the father now to say, "Well, having considered the matter further and most seriously, I think in the last resort it is better for M. to be with me and H. to be with her mother; and for the children to be split" is contrary to all that he said and urged before the justices. Secondly, the justices have found as a fact that M. is not unhappy with the mother and that, I think, is clearly supported by the reports which we have and by the school report from Brighton. Thirdly, there is the father's letter to the mother dated 17th October which I do not propose to read, but which I hope on reflection the father will realise ought never to have been written. Finally, and perhaps most cogent, taking the graphic phrase used by counsel for the mother, the real danger to this boy lies in the fear or the possibility that he will if in the father's care be "smothered by possessiveness" and all his great talents will go to naught.

Appeal allowed in part.

Solicitors: *Denis Hayes & Co.; Church, Bruce, Hawkes, Brasington & Phillips, Gravesend.*

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON AND PHILLIMORE, L.JJ., AND LAWTON, J.)

January 31, 1969

R. v. DICKSON

Criminal Law—Indictment—Additional charges—Charges based on fresh facts not subject of committal—Duty of police to inform defendant when charges formulated—Duty of defence to obtain copy of indictment from court—Indictments Act 1915 (5 & 6 Geo. 5 c. 90), Sch. I, r. 13.

Where additional charges are preferred against a defendant based on fresh facts which were not the subject of committal, it is the duty of the police to inform the defendant of those charges as soon as it is decided to formulate them, and to caution him so that he can, if he wishes, make a statement. Furthermore, those representing the defence should obtain at the earliest possible moment a copy of the indictment from the clerk of assize or clerk of the peace, who under r. 13 of Sch. I to the Indictments Act, 1915, is under a duty to supply the defendant with a copy free of charge.

APPLICATION by Robert Dickson for leave to appeal against his conviction at the Central Criminal Court on five counts of robbery with aggravation for which he was sentenced on each count to four years' imprisonment, the sentences to run concurrently.

On 2nd September 1967, three London milkmen were robbed of their takings in three attacks by a gang of three men. The robbers used an identified Jaguar car on the back window of which were found the appellant's fingerprints. On 16th September 1967, five more London milkmen were robbed of their takings in five attacks by three men. The appellant was charged in the first indictment with the robberies on 2nd September only, but his co-accused, Garnarie and Watkins, were charged in the indictment with the robberies on both dates. At the committal proceedings, one of the milkmen robbed on 16th September, a Mr. Hammond, having identified Garnarie and Watkins as being involved in a robbery on 16th September, proceeded to identify the appellant, who was in the dock with his co-accused, for the first time as being concerned in that robbery. The appellant was committed for trial on counts in the first indictment charging robbery on 2nd September only. He was also committed with his co-accused on a second indictment charging attempted housebreaking. The trial was fixed for 26th February 1968. On the 19th or 20th February 1968, the appellant's solicitors received a copy of the first indictment and became aware for the first time that the appellant was to be charged (counts 9 to 13 of the indictment) with the robberies committed on 16th September. The appellant therefore had only six days' warning that he was to be charged with five more robberies in addition to the three robberies on 2nd September with which he had already been charged. At the trial the appellant was acquitted of the charges of robbery on 2nd September, but was convicted on the five counts 9 to 13 charging robbery on 16th September. He applied for leave to appeal against those convictions alleging in his notice of application that he was unable to call witnesses to support his defence of alibi because of the short notice he received of the charges; that he was not given an opportunity to give a statement to the police replying to the charges of robbery on 16th September, and that the evidence identifying him with those robberies was unsatisfactory.

Counsel for the appellant consented to the application being treated as the hearing of the appeal.

J. B. R. Hazan for the appellant.

J. H. Buzzard for the Crown.

PHILLIMORE, L.J., delivered the judgment of the court, in which, having stated the facts, he continued: At the trial the learned judge virtually directed the jury that they should acquit the appellant in respect of the three robberies on 2nd September 1967 and the basis for that direction was this: that the appellant admitted knowing the other two accused, Garnarie and Watkins, against whom there was a substantial body of evidence, and accordingly it was not entirely unnatural that there should be a fingerprint of his inside the car which they had been using, and there being no other evidence except this fingerprint against him, the learned judge rightly felt that a conviction on those counts would be unsafe. However, the remaining counts of robbery, counts 9 to 13, dealing with the robberies from the five milkmen on 16th September, remained and the appellant was convicted of them. The evidence against him was extremely slender. It consisted of identification evidence by Mr. Hammond, the first milkman to be attacked that day, who was attacked about 12 p.m., and the evidence of a Mr. Beevor, who was a witness of the fourth attack, which took place fairly early in the afternoon. So far as Mr. Beevor's identification was concerned, the prosecution themselves invited the jury to disregard it as being quite unsafe and accordingly the case against the appellant depended solely on the evidence and identification of Mr. Hammond, he being the gentleman who had identified him for the first time when he was in the dock at Marylebone Magistrates' Court, sitting beside the accused Garnarie and Watkins. Mr. Hammond's account of the matter was that at about 12.30 p.m. on 16th September 1967 he was in Milford Road, Camberwell, when the appellant came up and spoke to him and then pushed him into his milk float whereupon the accused Garnarie and Watkins also came up and between them the three men robbed him. He described the appellant who had spoken to him as having a London accent and he also put him as being the shortest of the three. It appears that so far as height is concerned, he was hopelessly wrong, as he himself agreed when the three accused stood up in the dock. So far as the London accent is concerned, the appellant is from Scotland and apparently speaks with a broad Scottish accent.

It is in those circumstances that counsel for the appellant submits that these convictions for robbery were unsafe and unsatisfactory and counsel for the Crown has very fairly said that he does not himself feel that they ought to stand.

The appellant himself gave evidence and his defence to these counts was a defence of alibi. He called a Miss Weeks who lived in the same house as himself and who was, I think, a girl friend of the accused Watkins and she supported his alibi, at any rate in part. But he was also, it appears, anxious to call a Miss Wightman, the circumstances being that 16th September was her birthday and she would be able to give him an alibi covering those parts of the vital period which stretched from 12.0 p.m. till 3.0 p.m. or 3.30 p.m. which were not spoken of by Miss Weeks. Unfortunately, whether due to the fault of his solicitors or whether due to his tardiness in informing them of this witness or whether because she was not very anxious to give evidence—and there is a dispute as to all these matters—she was not called and it seems doubtful whether she was communicated with until after this trial although it is quite clear that counsel for the appellant would have wished to have called her. She has since sent statements from the United States (she is now married, she is a Mrs. Goode and is living in the United States) giving the appellant, if the statements are true, a complete alibi.

The court merely refers to these matters because it illustrates the undesirability of an accused being tried on very serious charges with inadequate notice of the

matters on which he is going to be tried. The court thinks that where, as here, additional charges are levied against an accused based on fresh facts which were not the subject of the committal, the police ought to see the accused as soon as it is decided to formulate these fresh charges and caution him so that he can, if he wishes, make a statement and is at least warned that these charges are impending. Furthermore, the court thinks that this is an opportunity for reminding those engaged in the defence of persons accused of crime that by r. 13 of the rules made under Sch. 1 to the Indictments Act, 1915, as affected by the Administration of Justice (Miscellaneous Provisions) Act, 1933, it is the duty of the clerk of assize after a bill of indictment has been preferred and signed to supply to the accused on request a copy of the indictment free of charge. We think that it is important that those engaged in the defence should maintain close touch with the court in order that they may obtain a copy of the indictment as soon as it is signed and at the earliest possible moment to enable the defence to be prepared.

It seems clear that if these steps had been taken in this case the appellant would at least have been able to call Miss Wightman, as he wanted to do and as his counsel wanted to do, whereas, in the event, everything being done at the last moment, he was unable so to do. For these reasons the court thinks these convictions were unsafe and accordingly the convictions on counts 9 to 13 of the first indictment against the appellant will be quashed.

Convictions quashed.

Solicitors: *Victor J. Lissack; Director of Public Prosecutions.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., EDMUND DAVIES, L.J., AND BLAIN, J.)

January 28, 1969

SOPP v. LONG

Weights and Measures—Sale by measurement—Railway refreshment room—Short measure of whisky sold by barmaid—Licensee not present—No knowledge on part of licensee—Instructions by licensee to the managers of refreshment rooms—Liability of licensee for causing short measure to be delivered—Weights and Measures Act, 1963 (c. 31), s. 24 (1).

The defendant, who was the secretary of British Transport Hotels, Ltd., was the licensee of a refreshment room at W. railway station. He had delegated his authority and his duty to supervise establishments of this kind, first to his general manager, then to his district manager, and finally to the manageress of the refreshment room. He had drafted instructions to managers and manageresses at refreshment rooms owned by British Transport Hotels, Ltd., which were sent by the general manager to all managers and manageresses. The object of the instructions was to ensure compliance with the law. The defendant had never been to the refreshment room at W. railway station and had never met the manageress. The manageress sold to a customer a short measure of whisky. The defendant was convicted at a magistrates' court of causing to be delivered whisky short of the full measure purported to be sold, contrary to s. 24 (1) of the Weights and Measures Act, 1963, but the conviction was quashed on appeal by the defendant to quarter sessions. On appeal by the prosecutor by Case Stated to the Divisional Court,

HELD: that the case must be remitted to quarter sessions with a direction that the conviction be restored, since only the defendant, the licensee, could sell, and, being absent from the premises, he sold through his servant, the manageress, and by every sale he conducted through her he thereby caused to be delivered the which was sold.

CASE STATED by the recorder of Windsor.

On 5th October 1967, the appellant, Charles Cyril Edward Sopp, a chief inspector of weights and measures, preferred informations under the Weights and Measures Act, 1963, against (i) one Josephine Bittana, charging that, on 12th September 1967, at the Windsor and Eton Central railway station, Thames Street, Windsor, in selling certain goods, namely, whisky, by capacity measurement, she delivered to one John Michael Pridham, the buyer thereof, a lesser quantity, namely, 0.74 fluid ozs., than the quantity of 1/6th of a gill (0.83 fluid ozs.) purported to be sold by her, contrary to the provisions of s. 24 (1) of the Act of 1963; (ii) the respondent, Paul John Basil Long, charging that, at the same time and at the same place in selling whisky by capacity measurement, he caused to be delivered to the buyer the lesser quantity than that purported to be sold as aforesaid, contrary to the provisions of s. 24 (1) of the Act of 1963. On 2nd November, 1967, Windsor justices heard the informations, found both cases proved, and fined the respondent £40, ordering him to pay an advocate's fee of £10.

The respondent appealed to Windsor Quarter Sessions against conviction and sentence, and at the hearing of the appeal the following facts were admitted or proved. At all material times the respondent, who was the secretary of British Transport Hotels, Ltd., was the licensee of the refreshment room at the railway station. He had delegated his authority and his duty to supervise, first, to his general manager, thence to his district manager, and thence to Josephine Bittana, the manageress of the refreshment room. The respondent had never met Josephine Bittana before the laying of the informations and had never been to the refreshment room. In or about June, 1966, the respondent drafted certain instructions addressed to managers and manageresses of refreshment rooms owned by British Transport Hotels, Ltd., entitled "Weights and Measures Act, 1963. Use of Spirit Measures: Refreshment Rooms". The instructions were sent by the general manager of British Transport Hotels, Ltd., to all the managers and manageresses. Josephine Bittana had in fact sold to John Michael Pridham a lesser quantity of whisky than she purported to sell to him. The respondent at no time authorised her to serve customers in the refreshment rooms with short measure. The measure of whisky purported to be sold was 1/6th of a gill. Thirty-two of such measures could be obtained from a bottle of whisky. To minimise the possibility of short measure being given by bar attendants, British Transport Hotels, Ltd., required their bars to account for only 31 measures per bottle of spirits.

It was contended by the respondent that he could not and did not "cause to be delivered" the alleged or any short measure on the ground that he had not authorised or consented to the delivery of short measure, but that, on the contrary, he had taken reasonable steps to prevent the delivery of short measure, and that a man could not be said to "cause" an action of which he had no knowledge, to which he had not consented, and which he had expressly or by implication forbidden. If the respondent was guilty of any offence, it was the offence of "delivering" the lesser quantity of spirit, and not the offence of "causing" the lesser quantity to be delivered. It was contended for the appellant that it was permissible to look at other Acts or at other sections of the Weights and Measures Act 1963 only if s. 24 was not clear in itself.

Section 24 was clear in itself. The recorder ought to look at the mischief that Parliament intended by the Weights and Measures Act 1963 to prevent. The words "causes to be" appearing in s. 24 (1) were not mere surplusage but must convey an additional meaning. The question in *McLeod (or Houston) v. Buchanan* (1) was only one of "permitting"; in *Shave v. Rosner* (2), the person alleged to have "caused" was not an employee of the person alleged to have been "caused". The respondent caused a measure to be delivered which happened to be short and s. 24 created an absolute offence in any case where that was so. The respondent did not avail himself of the defences open to him under the Weights and Measures Act 1963 and in particular under s. 27 thereof. The purpose of s. 27 was to protect persons such as the respondent charged under s. 24 (1) with having "caused to be delivered" a short measure. The other Acts referred to in the authorities did not relate to cases concerning employer and employee. In s. 24 there was no question of knowledge and, accordingly, no question of "permitting". By an alleged "chain of command", the respondent "caused" to be delivered a measure which was short. The respondent consequently was guilty of the offence as charged.

The recorder allowed the appeal on the following grounds. (a) There was no direct line of causation between the respondent and Josephine Bittana; (b) it was wrong to hold in such a case that the person at one end of the so-called chain of command had "caused" a short measure to be delivered at the other end of the chain to the buyer when there was no evidence that he actively caused or counselled the lesser quantity to be delivered; (c) although the section created an absolute offence, the respondent was not charged with delivering short measure by his servant or agent; (d) the mischief rule should only be applied in cases of ambiguity; (e) *Lovelace v. Director of Public Prosecutions* (3) was a very similar case to the appeal and he was bound by its authority to accept its interpretation of the meaning of the word "caused" and he saw no reason why that interpretation should not be applied to the appeal. The appellant appealed.

M. H. Jackson-Lipkin for the appellant.

D. G. Knight for the respondent.

EDMUND DAVIES, L.J.: This is an appeal by way of Case Stated from the decision of the learned recorder of Windsor, dated 19th December 1967 when he allowed an appeal by the respondent against his conviction by the magistrates of contravening s. 24 (1) of the Weights and Measures Act 1963 by causing to be delivered whisky short of the full measure purported to be sold. It will be convenient to look at the words of that subsection. So far as is relevant they are in these terms:

"... any person who, in selling or purporting to sell any goods by ... measurement ... delivers or causes to be delivered to the buyer a lesser quantity than that purported to be sold or than corresponds with the price charged shall be guilty of an offence."

[His LORDSHIP stated the facts, and continued:] It was contended for the respondent, who was convicted by the justices of causing to be delivered a short measure: (a) that he had not authorised or consented to that being done, but, on the contrary, had taken reasonable steps to prevent the delivery of any short measure; (b) that a man cannot be said to "cause" an action of which he had no knowledge, to which he had not consented, and which he had expressly

(1) [1940] 2 All E.R. 179.

(2) 118 J.P. 364; [1954] 2 All E.R. 280; [1954] 2 Q.B. 113.

(3) 119 J.P. 21; [1954] 3 All E.R. 481.

or by implication forbidden; and (c) that, if he was guilty of *any* offence, it was the offence of *delivering* the lesser quantity and not the offence of "causing" it to be delivered. For the appellant, on the other hand, it was contended that knowledge of the illegal act or prior authority to the barmaid to commit such illegal act was quite immaterial to the question of whether or not the respondent was guilty of the offence charged; that he had in truth caused a measure to be delivered by the barmaid, inasmuch as s. 24 made it an absolute offence in circumstances where, on delivery by the barmaid, that which was delivered pursuant to an act of sale was a short measure; and that s. 24 involves no question of knowledge in the circumstances that here had to be considered. The learned recorder ended the appeal on grounds which are set out in the Case Stated in this way:

"(a) There was no direct line of causation between the respondent and [the barmaid]; (b) it was wrong to hold in such a case that the person at one end of the so-called chain of command had 'caused' a short measure to be delivered at the other end of the chain to the buyer when there was no evidence that he actively caused or counselled the lesser quantity to be delivered; (c) although the section created an absolute offence, the respondent was not charged with delivering short measure by his servant or agent..."

The learned recorder ended by referring to *Lovelace v. Director of Public Prosecutions* (1).

One must begin by looking very closely at the words of the relevant Act of Parliament when dealing with any case where the question of knowledge or imputed knowledge rears its head, and the citation of authorities on other statutes and different facts calls for particular care. For example, in *Lovelace's* case (1), it is to be observed that, unlike the present case, there was no master-and-servant relationship at all. It related to the production of a French play in Liverpool, and the manager and licensee of the theatre had warned the principal actor that the licensed script must be strictly followed. It was not, and the manager was held guilty by the magistrate of having caused the actor to present the unauthorised incident. He appealed, and this court allowed the appeal and quashed the conviction. In the course of his judgment, LORD GODDARD, C.J., said:

"We are asked in the present case to say that the conviction was wrong because the charge was 'causing' and there was no evidence of any causation, as the facts found by the magistrate show that the appellant took every precaution to prevent that being done which was done. It has been held repeatedly that, although the prohibition of doing an act is absolute so that scienter or mens rea is not necessary, different considerations apply where a person is charged with 'causing' or 'permitting' the act to be done, because one cannot 'cause' or 'permit' an act to be done unless one has knowledge of the facts. LORD WRIGHT put it in this way in *McLeod (or Houston) v. Buchanan* (2): 'To "cause" the user involves some express or positive mandate from the person "causing" to the other person, or some authority from the former to the latter, arising in the circumstances of the case'."

We pass from that decision by observing that it dealt with an entirely different set of facts from those that we are now concerned with. So did *McLeod (or Houston) v. Buchanan* (2), which was another case where the relationship of

(1) 119 J.P. 21; [1954] 3 All E.R. 481.

(2) [1940] 2 All E.R. 179.



master and servant, and of the authority of the latter to act for the former, was not involved at all. It was a case where a man was charged with permitting his brother to drive a vehicle not covered by insurance, and no master-servant link existed. Further, it was not a case of "causing", but one of "permitting", and the exact connotation and ingredients of "causing" did not really call for decision. Nevertheless, LORD WRIGHT did say:

"It is clear that the respondent did not 'cause' his brother to use the van on the road as the brother was doing. To 'cause' the user involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To 'permit' is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate."

Is it the law, then, that, under s. 24 (1) of the Act of 1963, there can be no causing to deliver a short measure pursuant to an act of sale unless the person charged with such an offence has knowledge, or has previously authorised, that a short measure is to be sold? If so, it places an extremely restricted limit on the operation of s. 24. For all practical purposes it would mean that no person could properly be so charged unless his role was that of an aider and abettor in the offence charged against the principal offender—in this case the barmaid. If that be the position, then so be it; but it is a dangerously easy defence to raise to a charge of this kind. The court is, of course, always reluctant to hold a person guilty of an offence when there has been no moral failing on his part. But in this context it is of importance to bear in mind that, within the four corners of this particular Act, provision has been made whereby a person occupying the position of a wholly innocent employer, who so far from aiding and abetting a contravention of the law has done all that he can to adjure his employees strictly to observe it, is afforded a means of relief. That means is provided by s. 26 and s. 27 of the Weights and Measures Act 1963. Their precise terms need not be quoted, but their practical effect is that a person who without fault finds himself the employer of one who has contravened the law is afforded a defence by showing that he took all reasonable precautions and exercised all diligence to avoid the commission of such an offence as that charged in respect of the property in question or the person under his control. It is, perhaps, significant that the respondent never invoked those sections.

I have already said that it is necessary to have in mind the words of the particular Act when one is dealing with the exact connotation of such a phrase as "causing" this, that or the other to be done. A most important decision in this context is *Hunter v. Clark* (1). That was a case under the Motor Vehicles (Construction and Use) Regulations, 1955, and the owner of a vehicle was charged with, and convicted of, causing its use in contravention of the regulation which related to the braking system. LORD SORN dissenting, the Court of Session held that evidence of knowledge of the breach of the regulations was not necessary for a conviction of the owner on such a charge. There is an important passage in the judgment of the Lord Justice General (LORD CLYDE) in these terms:

"I am unable to see any justification for reading the word 'knowingly' into the words used in the Regulations. Such a qualification of the language employed would confine cases where it is an offence to cause a vehicle to be used in a certain condition to cases where the employer deliberately sent it out in such a condition—and such cases must be rare indeed. The words

'caused to be used' appear in many of the Regulations and such a restriction on their ambit would go far to defeat their manifest purpose."

Then a little later there is a reference by LORD CLYDE to *McLeod (or Houston) v. Buchanan* (1), it being pointed out that there the charge was one of permitting, and LORD CLYDE accordingly went on to deal with what was involved in the notion of permission. Then finally he said this:

"The duty is not merely to take all reasonable steps to maintain the brakes in proper condition but in fact so to maintain them. I turn to Regulation 104 to see who are the persons upon whom that duty is laid. One of them is the user. It seems to me beyond doubt that, if a person uses a vehicle in contravention of this absolute duty, he is guilty of an offence whether he knew of the defect or not. The fact of use of the vehicle is enough to attract the duty to him. The next class of person upon whom the absolute duty is laid is a person who causes the vehicle to be used in breach of the absolute obligation. Here also, in my opinion, no evidence of knowledge of the breach is necessary. The person causing the use is a person directly responsible for this potentially dangerous vehicle being on the road."

While counsel for the respondent concedes that one does not have to read into s. 24 (1) the word "knowingly", he nevertheless submits that there can be no causing a short measure to be delivered pursuant to an act of selling unless there is knowledge that a short measure is being delivered or prior authority given for that act to be committed. In my judgment, that submission is not sound. Only the licensee can sell—that is common ground—and he alone sold. Being absent from the premises, he sold through his servant, the barmaid; by every sale he conducted through her, he thereby "caused" to be delivered that which was sold; and that he did, whether that which was delivered was a short measure or a full measure.

The learned recorder, in my judgment, was in error in holding that there was no direct line of causation between the respondent and the barmaid, and wrong (for the reasons which I have sought to indicate) in holding that, in the absence of evidence that he actively caused or counselled a lesser quantity to be delivered, there was not the causing of a short measure to be delivered by him, within the meaning of s. 24. In my judgment, it accordingly follows that the allowing of the appeal by the recorder was erroneous, that the conviction should have stood, and that this present appeal by way of Case Stated should now be allowed.

BLAIN, J.: I agree. **EDMUND DAVIES, L.J.,** in mentioning the natural reluctance of the courts to convict of an offence a man innocent of moral obliquity has pointed out that Parliament, conscious of that difficulty, has provided by s. 26 and s. 27 of the Weights and Measures Act 1963 defences in certain cases. I would add only that s. 26 is available in cases where the offence has been committed through mistake or accident so long as the person charged proved that he took reasonable precautions and exercised all due diligence to avoid the commission of such an offence, and s. 27 gives a comparable defence in cases where the moral culprit was other than the person charged. Between those two sections, therefore, there is available complete protection in cases where the general reluctance of the courts would otherwise have provided some difficulty. In its own terms I agree with everything that has been said by **EDMUND DAVIES, L.J.,** as to the interpretation of s. 24 (1), and the conclusions of that judgment.

LORD PARKER, C.J.: I also agree. The order will be that the appeal is allowed and the Case sent back to the recorder with a direction that the conviction which he set aside be restored.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *E. R. Davies*, Reading; *M. H. B. Gilmour*.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 11, 12, 1968

CAMPBELL v. TORMEY

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Requirement to take breath test—"Person driving or attempting to drive"—Car parked and locked—Driver about to enter house and hand over key—Necessity for valid arrest prior to breath test—Road Safety Act, 1967, s. 2 (1).

The defendant, who had been driving a motor car, parked the car outside his father-in-law's house, took out the ignition key, and locked the car. He was about to enter the house and hand over the key to his father-in-law when he was stopped by police officers who had followed the car. When asked to blow up the bag of a breathalyser, he failed to do so, but voluntarily accompanied the police officers to a police station, though he had not been formally arrested. At the police station he took two breath tests and a blood sample was subsequently taken. Justices dismissed an information charging him with driving with a blood-alcohol proportion above the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967. On appeal by the prosecutor,

HELD: the appeal should be dismissed on the grounds (i) that a person who was no longer driving or intending to drive a vehicle could not be held to be "driving or attempting to drive" within the meaning of s. 2 (1) of the Act of 1967 so as to be under an obligation to take a breath test; (ii) there had been no valid arrest, which under s. 3 (1) of the Act was a necessary preliminary to a breath test.

Per LORD PARKER, C.J.: If the defendant had been arrested under s. 6 (4) of the Road Traffic Act, 1960, a specimen could properly have been demanded, and would have been admissible in evidence on the charge before the court.

CASE STATED by the Manchester stipendiary magistrate.

On or about 28th March 1968 an information was preferred by the appellant, P.c. David Ferguson Campbell, against the respondent, Frederick Joseph Tormey, charging that he, on 23rd March 1968 on a certain road viz., Whitley Road, in the city of Manchester, drove a motor car, registration number HVM 23F, having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from the laboratory test for which he subsequently provided a specimen, under s. 3 of the Road Safety Act 1967, exceeded the prescribed limit at the time he provided the said specimen, contrary to s. 1 and s. 5 of the Road Safety Act 1967.

On the hearing of the information at Manchester magistrate's court on May 6, 1968, the following facts were found. At 2.25 a.m., on Saturday, March 23, 1968, police officers in a motor vehicle followed the respondent for approximately half-a-mile while he drove a motor vehicle on a public road. There was nothing untoward in his driving save that when he came to turn to his right off the main road into a new housing estate he turned late so that in order to complete the turn the near side front wheel of his car mounted the kerb for a matter of a yard or so. The respondent drew up and parked the car in the roadway outside

the home of his father-in-law where he was staying the night. He withdrew the ignition key, got out of the vehicle, locked the door and was about to enter the curtilage of his father-in-law's house, intending then to hand over the ignition key to his father-in-law, when the police officers who had stopped their own vehicle behind the respondent's, spoke to him. The appellant, who was in uniform, told the respondent what he had seen and said "I am of the opinion that you are drunk", and cautioned him. The respondent said that he had had a drink, but did not run over the footpath. The respondent's breath smelt of alcohol. The police officers still on the pavement outside the house had reasonable cause to suspect the respondent of having alcohol in his body and of having committed a traffic offence and required the respondent to blow into an Alcotest 80 apparatus of a type approved by the Secretary of State under s. 7 (1) of the Road Safety Act 1967. The respondent appeared unable to blow the bag up properly. The police officers then asked him to come to the Willert Street police station 150 to 200 yards away as it was a wet night. The respondent agreed to do so. At 2.35 a.m. at Willert Street police station the respondent was required again to provide a specimen of breath for a breath test and blew the bag of the approved apparatus up properly. This test proved positive. On request the respondent gave a second specimen at the police station at 2.55 a.m. in approved apparatus and this again proved positive. At 3.05 a.m., Inspector Hickson required the respondent to give a specimen of blood, told him that he would receive a sample and that failure to provide a specimen would make him liable to imprisonment, a fine and disqualification from driving. The respondent provided a sample of blood to Dr. Behrens who issued a certificate to that effect and the analyst's report on the blood showed that it contained not less than 192 milligrammes of alcohol in 100 millilitres of blood.

It was contended by the appellant that the procedure under the Act had been followed correctly in that the respondent, when required to provide a specimen of breath, was a "person driving . . . a motor vehicle on a road" for the purposes of s. 2 (1) of the Road Safety Act, 1967, and that the fact that he had completed his journey did not prevent the police acting under s. 2 (1). It was contended by the respondent that since he had completed his journey he was not a "person driving . . . or attempting to drive" who could be required to provide a specimen of breath, under s. 2 (1) of the Road Safety Act, 1967.

The magistrate was of the opinion that since the respondent had completed his journey and removed the keys from the car and locked it with no intention whatsoever of returning to it, before he was required to provide a specimen of breath he was not a "person driving . . . or attempting to drive" who could be required to provide a specimen of breath under s. 2 (1) of the Road Safety Act 1967, and that therefore the whole police procedure in this case was vitiated from the beginning and that it was fundamental to the offence created by s. 1 that there should have been valid breath tests before the specimen of blood was provided. He therefore dismissed the charge.

It was further contended by the respondent that being required to take a breath test not at the roadside but at the police station did not accord with the provisions of s. 2 (1) that such requirement should be made "there or nearby". The magistrate was of the opinion, on the facts of the case including the respondent's consent to the suggestion at the time, that the police station was nearby within the meaning of s. 2 (1), but this finding was not of direct relevance in view of his other finding. The appellant now appealed.

Leave was given during the hearing to raise an additional point, not argued in the court below, viz., that at no material time was the respondent under

arrest and, accordingly, following the decision in *Scott v. Baker* (1), the police had no power to require a specimen of breath or blood to be taken at the police station.

G. Vaughan-Davies for the appellant.

P. Curtis for the respondent.

ASHWORTH, J.: This is an appeal by way of Case Stated from a decision of the stipendiary magistrate for the city of Manchester before whom the respondent was charged that, on a certain road in the city of Manchester, he drove a motor vehicle having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from the laboratory test for which he subsequently provided a specimen, exceeded the prescribed limit contrary to s. 1 (1) of the Road Safety Act 1967. It is, as the court has been informed, a case of some importance and raises two quite distinct issues. The first issue is the question: at what stage can a breath test be required of a person who has been admittedly driving a car, and the second question is: what is involved in the term "arrest".

The facts are that, on Saturday 23rd March 1968, at about 2.30 a.m. the respondent's vehicle was followed by police officers for about half-a-mile. There was not anything untoward in the respondent's driving, except that when he turned off the main road into the housing estate to which he was going, he drove his car slightly over the kerb for a matter of a yard or so. He then drew up and parked his car in the roadway outside the home of his father-in-law, took out the ignition key, got out of the vehicle and locked the door. The respondent was about to enter the curtilage of his father-in-law's house, intending to hand over the ignition key to his father-in-law, when the police officers spoke to the respondent. The appellant, who was in uniform, told the respondent what he had seen, and said: "I am of the opinion that you are drunk", and cautioned him. The respondent said that he had had a drink, but that he did not run over the footpath. His breath smelt of alcohol. The officer, as the case finds, had sufficient cause to suspect the respondent of having alcohol in his body and of having committed a traffic offence, and accordingly required him to blow into an Alcotest apparatus. He was unable to blow up the bag properly, and then, because it was raining, the officers understandably enough asked him to come to a police station some 150 to 200 yards away, and he agreed to do so. At the police station he was again required to provide a specimen of breath for a breath test, and this time he blew up the apparatus properly and the test proved positive. He provided a second breath specimen half-an-hour later, and the test again proved positive. He then gave a specimen of blood which on analysis turned out to have not less than 192 milligrammes of alcohol in 100 millilitres of blood. At the proceedings before the learned stipendiary, the first point taken was that the procedure required by the Road Safety Act 1967 had not been complied with because, at the time when he was asked or required to give a breath test, the respondent was not a person driving or attempting to drive a vehicle who could be required to give a specimen.

Another point was taken, namely that in any event s. 2 (1) contained the requirement that the specimen must be provided "there or nearby", and because in this instance it was provided eventually at a police station 150 yards away, the words "there or nearby" were not satisfied. I can dispose of that particular point at once, because counsel for the respondent has frankly and properly conceded that there is no substance in it. So the Case was stated on

(1) 132 J.P. 422; [1968] 2 All E.R. 993.

what appeared to be the main issue, namely whether at the material time the respondent was a person driving or attempting to drive the car.

When the matter came before this court, counsel for the respondent intimated that he wished to take a further point, namely, that at no material time was the respondent under arrest, and accordingly following *Scott v. Baker* (1) there was no jurisdiction to require a specimen of breath or blood at the police station. The Case might have had to be sent back to enquire further into the facts as to arrest, and indeed leave was needed to take this point here, because it had not been raised in the court below. It is a point of substance, and counsel for the appellant with great propriety said that he was not prepared to object to the point being raised, and went on to say that he would concede that there was no formal arrest of the respondent at any time, though he reserved the right to argue that the effect of what happened at the police station was to constitute the respondent a man under arrest, and that that was sufficient compliance with s. 3.

The Road Safety Act 1967 provides in s. 1 (1) that if a person drives or attempts to drive a motor vehicle with an excess of alcohol in his blood he commits an offence; the material words are for this purpose "drives or attempts to drive". In order to put teeth into s. 1, so to speak, and avoid some of the difficulties which under earlier statutes had arisen in regard to proof, s. 2 introduces the new idea of breath tests. By s. 2 (1) it is provided that:

"A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion. Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence."

In passing, it is worth calling attention to s. 2 (2), which deals with the situation when there has been an accident. That provides, so far as material:

"If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test..."

The importance of citing that subsection is to show the contrast between the words in s. 2 (1) "any person driving or attempting to drive" and the words in s. 2 (2) "who he has reasonable cause to believe was driving or attempting to drive".

At first sight it might appear that s. 2 (1) imposes on a constable in uniform the obligation of requiring the breath test while the person is actually driving the vehicle on the road, in other words that it imposes on him the obligation somehow of requiring the test while the vehicle was in motion. It is accepted in this court, and it follows from *R. v. Price* (2) to which I will refer, that the strict and literal reading of the provision makes nonsense of the Act, and accordingly the phrase "any person driving" is not limited to a person who is actually and physically driving the vehicle at the moment when the test is required. The major difficulty in this case, having extended the word "driving" to cover

(1) 132 J.P. 422; [1968] 2 All E.R. 993.

(2) Ante, p. 47; [1968] 3 All E.R. 814.

something more than the moment when the vehicle is in motion, is to know where the line is to be drawn.

In *R. v. Price* (1) the situation was that the driver had committed a traffic offence inasmuch as he was not showing the appropriate lights at the rear of his vehicle, and he had stopped the car in order to relieve himself at a public lavatory. When he returned, the police officer went over to him as he was getting into the car and spoke to him and he was then required to provide a breath test. It was submitted on behalf of the driver that that requirement was in itself outside the provisions of the Act, because at the moment when the requirement was made the vehicle was not in motion. But it is fair to say that counsel for the appellant in that case realised the absurdity of pressing that contention too far. In giving the judgment of the court, LORD PARKER, C.J., said this:

"This court can see no ground whatever for construing [s. 2 (1)] in that way [that is to say in that narrow strict way]. It seems to this court that the phrase 'any person driving'—once one realises that it clearly cannot refer to the time when the vehicle is in motion—applies to what one might call generally 'the driver', somebody who is not only at the steering wheel while the vehicle is in motion but somebody who is in the driving seat while the vehicle is stationary; and what is more, somebody who has got out of the driving seat albeit temporarily and can still be termed, in general terms, 'the driver'."

That extension, if I may say so, is in clear accord with a reasonable and sensible construction of the Act, and falls well within the passage cited by counsel for the respondent from MAXWELL ON THE INTERPRETATION OF STATUTES (11th Edn.), p. 254, that is to say it is in accord with the reasonable meaning of the words, and also in accord with the spirit and intendment of the Act. But the argument for the respondent says: so far and no further. In *R. v. Price* (1) it was quite plain on the facts that the journey was not over, it was merely a temporary pause, and therefore one could reasonably and sensibly speak of the appellant Price as being the driver. On the other hand, it is said that in the present case the journey was over, as admittedly it was, the keys were out of the car and about to be handed over to the respondent's father-in-law, and in no real sense could the respondent be described as the driver. It might be, although it is not necessary to express a final view about it, that he was at the moment when the requirement was made in charge of the vehicle, but he was, so the argument goes, no longer the driver. This approach to the matter does perhaps at first sight create difficulties in the administration of this new statutory drive against motorists who have taken too much to drink, because it might be thought that all a driver had to do when he was conscious that the police were after him and he might be required to take a breath test, would be to stop and say "my journey is over, I am no longer the driver". The answer to this kind of objection, as I see it, is as counsel for the respondent pointed out, that those concerned with the enforcement of the Act are not without remedy, and not without remedy in applying the Road Safety Act 1967 even when the particular journey is over, because as counsel said, and I agree with him, there is provision for action by a police officer who suspects that a man who has been driving has been driving with too much alcohol in his blood, because he can make use of the provisions contained in s. 6 (4) of the Road Traffic Act 1960, that is to say—"A police constable may arrest without warrant a person committing an offence under this section", which section is headed "Driving, or being in charge, when under influence

(1) Ante, p. 47; [1968] 3 All E.R. 814.

of drink or drugs". Moreover, and this is what Parliament may well have contemplated, in a situation, such as is involved in the present case, the provisions of the Act of 1960 might well be made use of by the police, because s. 3 (1) of the Act of 1967, which provides for the laboratory test, starts with these words:

"A person who has been arrested under the last foregoing section or section 6 (4) of the principal Act may, while at a police station, be required by a constable to provide a specimen for a laboratory test . . ."

and so on. Therefore, as it seems to me, a case such as this, a police officer has power, not under s. 2 of the Act of 1967 but under s. 6 (4) of the Act of 1960 to arrest, to take the driver to the police station, to require tests to be taken, and specimens to be supplied, and thereafter if the results of the test show that the prosecution is justified, to proceed against him under s. 1 of the Act of 1967.

So I come back to s. 2 (1), and pose the question whether it is necessary to give business efficacy to this Act of 1967 to construe the words "any person driving or attempting to drive" as including a person who has been driving or has been attempting to drive. In my judgment, although the matter is by no means free from difficulty, I think that the answer is that Parliament were directing their attention in s. 2 (1) to a person who could truly be called the driver in this sense, that he was a person who temporarily and no more had ceased to drive. I say that for this reason—I am afraid it is repetition—that while he is actually driving it is agreed on all sides that he cannot be required to give a breath test, but it contemplates a person who has, so to speak, immediately before the requirement been driving, has admittedly stopped driving either because he is stopped by the police or because he has stopped to relieve himself, but it does not include a person who is no longer driving or intending to drive the vehicle within the plain meaning of that expression. Therefore on the ground which the learned stipendiary found was sufficient to dismiss this summons, I would agree with him and dismiss this appeal.

But it is also necessary to deal with the other point raised by counsel for the respondent. It is accepted, as already stated, that there was no formal arrest of the respondent. He was asked to come to the police station because it was a wet night. No doubt if he had refused to come, the police officer in question might have thought it necessary to arrest him and then this difficulty may never have arisen at all. But because the respondent was reasonable and went there on his own accord, it is impossible to say he was arrested. But, says counsel for the appellant, true he was not arrested before he got to the police station, but he was under arrest at the police station, and it was while he was under arrest that he was required to take the breath test and supply the specimen. He relies on *R. v. Jones, Ex p. Moore* (1), and the comments on it, in particular to the effect:

"If a person accompanies a policeman voluntarily and not in consequence of a command he is not arrested . . .; but there is an arrest if that person goes only because he feels constrained to do so. If, in the present case, it had been brought home to M. that he either had to sign the document put before him or remain at the police station, he would have been under arrest."

Counsel for the appellant invites this court to say that it must have been brought home to the respondent in the police station that if he declined to provide specimens of breath and blood, he would be detained in the police station and must therefore be considered as being under arrest. For my part, I do not find

it necessary to express a final view on that contention. What I am quite satisfied in my own mind about is that he was never arrested, and if there is a distinction between a person under arrest and being arrested, then that would apply to the present case. The reason why in my view this is a point of substance is, as was said in argument: the Act specifically requires arrest as a preliminary to the imposition of the test, and a man who is arrested is entitled to know for what reason he is being arrested. I think it would be a dis-service to the administration of the Act of 1967 and indeed contrary to its provisions if this court were, so to speak, to overlook the express requirement and say that in effect voluntary attendance at the police station was the equivalent of arrest which is specifically enjoined in the Act. Therefore there are in my view two reasons why this appeal fails, first because the respondent was not driving, and secondly because he was never arrested. I would dismiss this appeal.

WILLIS, J.: I agree.

LORD PARKER, C.J.: I agree with all that has fallen from ASHWORTH, J. Proof of an offence against s. 1 (1) of the Road Safety Act 1967 depends on the proper taking of a specimen under s. 3 (1) of that Act. Before that specimen can be validly taken, there must have been prior conditions fulfilled. Those conditions fall under two alternative headings, one is a very short one: that the police had reasonable cause for belief that the man concerned was guilty of an offence against s. 6 of the principal Act, that is the Road Traffic Act 1960, and thereupon arrested him under sub-s. (4) of that section. The other line of conditions are those set out in s. 2 of the Road Safety Act 1967 itself, in other words power validly exercised by a constable to require a breath test, the breath test proving positive or the defendant failing to give one, in which case there is a power to arrest. Section 3 (1) states that once a person has been arrested under s. 2 of the Act itself or under s. 6 (4) of the principal Act, then there is power to require a specimen of blood or urine if he has previously been given an opportunity to take a breath test, which in a s. 2 case will be a second breath test. I only say that in some detail because I think it shows clearly the importance of there being in these cases a formal arrest under which the accused is told what he is being arrested for. If in this case there had been an arrest under s. 2, then, following ASHWORTH, J.'s reasoning, there was no power to require a breath test under s. 2 (1) and the arrest would have been wholly invalid. On the other hand, if he had been arrested under s. 6 (4) of the principal Act, then as it seems to me a specimen could properly have been demanded, and on proof of the analysis he would have been guilty of an offence under s. 1 (1) of the Act. I agree that on both grounds this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *D. S. Gandy*, Manchester; *Adam Burn & Metson*, for *Conn, Goldberg & Co.*, Manchester.

T.R.F.B.

COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, M.R., RUSSELL and WIDGERY, L.JJ.)

December 16, 17, 18, 19, 1968

SCHMIDT AND ANOTHER *v.* SECRETARY OF STATE FOR HOME AFFAIRS

Alien—Leave to land—Extension of period of stay—Refusal—Public policy—Natural justice.

The plaintiffs were aliens and students at the H. College of Scientology. They were granted permits for a limited stay in the United Kingdom for the purpose of full time study at a recognised educational establishment. Their application for an extension of time for the purpose of continuing the study at the H. College was refused by the Home Secretary on the ground that it was his declared policy not to grant any extension of time for the purpose of study at that college. The plaintiffs instituted proceedings claiming a declaration that the decision was void because the Home Secretary had not considered their applications on their merits. On the Home Secretary's application the plaintiffs' statement of claim was struck out as disclosing no reasonable cause of action and being an abuse of the process of the court. On appeal,

HELD (RUSSELL, L.J., dissenting): an alien had no right to enter the United Kingdom without leave, and, having entered, to have the time extended, and could be refused permission to remain without reasons being given; accordingly, the plaintiffs having no right capable of being interfered with, no question of natural justice arose.

PER LORD DENNING, M.R.: The Home Secretary may, in the honest exercise of his discretion, adopt a policy and announce it to those concerned, so long as in exceptional cases he will listen to reasons why it should not apply.

INTERLOCUTORY APPEAL by the plaintiffs, Andrew Schmidt and Joseph Murranti (each suing on behalf of himself and 50 other alien students of the Hubbard College of Scientology), from an order of UNGOED-THOMAS, J., on the motion of the defendant, the Secretary of State for Home Affairs, striking out the plaintiffs' statement of claim as disclosing no reasonable cause of action and being an abuse of the process of the court.

J. P. Warner and Gordon Slynn for the defendant.

Quintin Hogg, Q.C., Peter Pain, Q.C., L. Giovane and Gavin Lightman for the plaintiffs.

LORD DENNING, M.R.: At Saint Hill Manor near East Grinstead, there is an establishment which calls itself the Hubbard College of Scientology. It is owned by an American corporation called the Church of Scientology of California. Scientology is a word which has recently been invented. It finds no place in the English dictionaries. Its proponents say that scientology is a religion; and that this religion, its faith and belief, its teaching and practices are taught to students at the college at East Grinstead. The present number of students is 234, of whom approximately 100 are aliens. Among those aliens are two citizens of the United States. These two bring an action in the courts against the Home Secretary. They bring it for themselves and 50 other alien students at the college. They say that they were permitted to come into this country in order to study at the College of Scientology. Their permits were for a limited time. The time has expired. They wished to complete their studies and asked the Home Secretary to extend their permits. He refused. They say that his refusal was invalid, because he did it for an unauthorised purpose, and also because he did not act fairly towards them.

The Home Secretary applied to strike out the action as disclosing no reasonable cause of action or as an abuse of the process of the court within R.S.C., Ord. 18,

r. 19. The judge struck it out. The plaintiffs appeal to this court. Their case has been put forcibly by their counsel.

It is the policy of the Home Office to allow an alien to enter this country if he comes into one out of several particular categories. One of these is when he comes "for the purpose of full-time study at a recognised educational establishment". In pursuance of that policy, the Home Secretary in August 1967 allowed the first plaintiff to enter this country, and in June 1968 he allowed the second plaintiff to enter. In June and July 1968, the secretary of the Hubbard College of Scientology applied on their behalf for an extension of their stay in this country. The letter on behalf of the first plaintiff said:

"I am applying for extension of stay for [the first plaintiff] until 5th November, 1968. [The first plaintiff] is a student at the Hubbard College of Scientology and he requires this time to complete his studies."

The letter on behalf of the second plaintiff was in the same terms. The Home Secretary did not reply at once to those letters and, before he replied, the Minister of Health made a statement in the House of Commons about scientology. I will give some extracts from it:

"Scientology is a pseudo-philosophical cult introduced into this country some years ago from the United States and has its world headquarters in East Grinstead. It has been described by its founder, Mr. L. Ron Hubbard, as 'the world's largest mental health organisation . . .' The government are satisfied, having reviewed all the available evidence, that scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well-being of those so deluded as to become its followers; above all, its methods can be a serious danger to the health of those who submit to them. There is evidence that children are now being indoctrinated. There is no power under existing law to prohibit the practice of scientology; but the Government have concluded that it is so objectionable that it would be right to take all steps within their power to curb its growth . . . The following steps are being taken with immediate effect: . . . (d) Foreign nationals already in the United Kingdom for study at a scientology establishment will not be granted extensions of stay to continue these studies . . ."

In the course of that statement, the Minister referred to an investigation which had been held in the State of Victoria, Australia, into scientology, and found it to be an evil; and to a debate in the House of Commons on 6th March 1967, when its evils were exposed. It is clear that the Minister does not regard scientology as a religion or as a church, as it claims to be. It is a pseudo-religion and a pseudo-church which he regards as socially harmful.

At the end of July 1968 the Home Secretary rejected the applications of the plaintiffs in these words:

"Your attention is drawn to the statement made to the House of Commons on July 25th by the Minister of Health in which he said that the Hubbard College of Scientology, and all other scientology establishments, will no longer be accepted as educational establishments for the purposes of Home Office policy on the admission and subsequent control of foreign nationals. In these circumstances the Secretary of State regrets that he is not prepared to extend your stay to enable you to continue as a student at one of the Hubbard Colleges. Your stay, has, however, been extended until 30th

September, 1968, to enable you to make suitable arrangements for your departure."

A fortnight later, on 14th August 1968, the plaintiffs issued the writ in this action, and they delivered a statement of claim. The question is whether it discloses a reasonable cause of action.

The first point is whether there is any case for saying that the Home Secretary acted unlawfully in refusing an extension. Both sides accepted as correct the statement in *R. v. Brixton Prison (Governor), Ex p. Soblen* (1) where I said that the validity of the Minister's act

"... depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful."

So I turn to consider what are the authorised purposes of the Home Secretary in respect of an alien—a friendly alien, no doubt—coming to this country. I have always held the view that at common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason. The common law has now been overtaken by the Aliens Acts and the orders thereunder. Article 1 (1) of the Aliens Order 1953 says that an alien shall not land or embark in the United Kingdom except with the leave of an immigration officer. Article 5 (1) says that leave may be granted to an alien subject to any conditions of which notice is given to the alien by the immigration officer. Article 5 (5) says that, where any such condition limits the period during which an alien may remain in the United Kingdom, he shall be deemed to contravene that condition if he is found in the United Kingdom at any time after the expiration of that period. If the alien stays beyond the time limited by the condition, he can be prosecuted; and if convicted, he can be recommended for deportation. Even if he is not prosecuted, the Home Secretary, under art. 20, can make a deportation order if he deems it to be conducive to the public good.

The order thus gives to the Home Secretary ample power either to refuse admission to an alien or to grant him leave to enter for a limited period, or to refuse to extend his stay. Counsel for the plaintiffs sought to limit that power. He said that the Home Secretary could only have regard to three purposes: (i) the safety of the realm; (ii) the observance of the law of the land; and (iii) the preservation of the standards of morality generally accepted in this country. In the present case counsel for the plaintiffs said that the Home Secretary did not exercise his power for any of those three authorised purposes, but for an unauthorised purpose which he stated to us in this way. The Home Secretary was, he said, using his power for the purpose of expressing disapproval of, and to bring into disrespect, a religious sect which was not prohibited by the law of the land. I do not think that the authorised purposes are limited in the way suggested by counsel. I think the Minister can exercise his power for any purpose which he considers to be for the public good or to be in the interests of the people of this country. There is not the slightest ground for thinking that the Minister exercised his power here for any unauthorised purpose or with any ulterior motive. The Minister's purpose was clearly disclosed in the statement which he made in the House of Commons. He thought that the practices of these people, these scientologists, were most harmful to our society, and that it was undesirable in the interests of the people of this country that alien students

(1) [1962] 3 All E.R. 641; [1963] 2 Q.B. 243.

of scientology should be allowed to stay any longer or that any new ones should be allowed to come in. That purpose was entirely justifiable. It was exercised by the Home Secretary in the interests of the ordinary people of this country; and I do not think we should admit any doubt to be thrown on its validity.

The second point is whether the Home Secretary was at fault in laying down a general policy about scientology and thus fettering his discretion. On this point both sides accepted the law as stated by BANKES, L.J., in *R. v. Port of London Authority, Ex p. Kynoch, Ltd.* (1), which shows that a tribunal may, in the honest exercise of its discretion, adopt a policy, and announce it to those concerned, so long as it is ready to listen to reasons why, in an exceptional case, that policy should not be applied. If such be the case with a tribunal, it is certainly the case with the Home Secretary. He is responsible for the immigration control. He has to give instructions to immigration officers so that they shall know how to act. That is recognised by art. 30 of the Aliens Order 1953. He must, therefore, be able to lay down general policy and give guidance to his officers for their day-to-day tasks. For instance, he can tell his officers that students may be admitted if they are coming to study at a recognised educational establishment; and he can tell them which establishments are recognised and which are not. There is no possible ground for challenging his policy in regard to scientology or his instructions that this East Grinstead establishment was no longer to be a recognised educational establishment.

The third point is whether there is any ground for saying that the Home Secretary did not observe the precepts of natural justice. Counsel for the plaintiffs submitted that the Minister ought to have given the students a hearing before he refused to extend their stay in this country. I see no basis for this suggestion. I quite agree, of course, that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf. But in the case of aliens, it is rather different; for they have no right to be here except by licence of the Crown. And it has been held that the Home Secretary is not bound to hear representations on their behalf, even in the case of a deportation order, though, in practice, he usually does so. It was so held in *R. v. Leman Street Police Station Inspector and Secretary of State for Home Affairs, Ex p. Venicoff* (2), which was followed by this court in *Soblen's case* (3). Some of the judgments in those cases were based on the fact that the Home Secretary was exercising an administrative power and not doing a judicial act. But that distinction is no longer valid. The speeches in *Ridge v. Baldwin* (4) show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say. Thus in *Re K. (H.) (an infant)* (5) a Commonwealth citizen had a right to be admitted to this country if he was (as he claimed to be) under the age of 16. The immigration officers were not satisfied that he was under 16 and refused him admission. LORD PARKER, C.J., held that, even if they were acting in an administrative capacity, they were under a duty to act fairly—and that meant that they should give the immigrant an opportunity of satisfying them that he was under 16.

(1) 83 J.P. 41; [1919] 1 K.B. 176.

(2) 84 J.P. 222; [1920] All E.R. Rep. 157; [1920] 3 K.B. 72.

(3) [1962] 3 All E.R. 641; [1963] 2 Q.B. 243.

(4) 127 J.P. 295; [1963] 2 All E.R. 66; [1964] 1 A.C. 40.

(5) [1967] 1 All E.R. 226; [1967] 2 Q.B. 617.

By contrast, in the later case of *R. v. Secretary of State for the Home Department, Ex p. Aktar Singh* (1) a Commonwealth citizen said he wanted to come in so as to marry a girl here. He had no right at all to be admitted. The statute gave the immigration officers a complete discretion to refuse. LORD PARKER, C.J., held that they were under no duty to tell him why he was refused admission and were not bound to give him an opportunity of making representations. If such be the law for a Commonwealth immigrant, it is all the more so for a foreign alien. He has no right to enter this country except by leave; and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right—and, I would add, no legitimate expectation—of being allowed to stay. He can be refused without reasons given and without a hearing. Once his time has expired, he has to go. In point of practice, however, I am glad to say that the Home Secretary does not act arbitrarily. He is always ready to consider any representations that are put before him; as indeed, we are told he is ready to do in these cases. We know too that SIR ROY WILSON and his colleagues have recommended (in Cmd. 3387) a system of appeals against exclusion of aliens. This may soon become law. But it is not so yet.

The fourth point was, assuming that the Home Secretary was under a duty to act fairly, whether there was any ground for saying that he had acted unfairly. I see no trace of unfairness at all. In his letter at the end of July, he extended their time for two months until the end of September. If the plaintiffs had had any representations to make, they should have made them during that time; but they made no representations. Instead of making representations, they brought this action, claiming that the Home Secretary was acting wrongly. Faced with this action, he quite rightly resisted the suggestion. And his fairness is shown by his readiness still to receive representations. The real point is whether the statement of claim is so bad that it ought to be struck out. I think it is. This action is quite unsustainable. I agree with the judge and would dismiss the appeal.

RUSSELL, L.J.: I find myself in disagreement with my brethren on the question whether this case is appropriate for the striking out procedure under the relevant rules of the Supreme Court. I am not satisfied that it is thus appropriate, having regard to the well-established approach of the court to such applications to strike out in summary fashion. This is not to say that I take the view that the points taken for the plaintiffs or any of those points will succeed. It is that I think it possible that some one or more might succeed at the trial. It would be unwise, in refusing to strike out, to enlarge on the reasons for saying that a point might succeed in the trial; to do so, especially in this court, might fetter the views of the judge at the trial, and for this reason I say little more. I would not presume to paint the lily of counsel for the plaintiffs' arguments which on certain points have left me with the view which I have stated that this is not a suitable case for summary striking out. I would, however, say on one point that it is in my view most certainly well arguable that the written reasons given by the Minister indicate a purpose of discouraging the institution at East Grinstead by cutting off its students rather than a purpose of keeping students away lest they do harm. What will happen if these students who are here stay until the point of deportation I do not know; nor do I know whether it will be

(1) July 25, 1967, unreported.

felt that considerations in connection with a deportation order are different from the considerations applicable to the question as to whether a limited permission to stay should not be renewed. I would, therefore, allow the appeal.

WIDGERY, L.J.: I agree with the judgment which has been delivered by LORD DENNING, M.R., and accordingly I also would dismiss this appeal. I think it is vital in this case to recognise at the start that an alien approaching this country and desiring to land has no right of any kind to do so unless and until permission is granted. I appreciate that there is some difference of opinion as to the right under the prerogative to deport aliens already here, but I do not understand it to be said in any way that the opportunity to land initially is one which cannot be refused arbitrarily, and that position is now made clear, if it was not made clear before, by the Aliens Order 1953. Accordingly, when an alien approaching this country is refused leave to land, he has no right capable of being infringed in such a way as to enable him to come to this court for the purpose of assistance, and, since he has no kind of right or interest capable of being infringed or affected, the considerations urged by counsel for the plaintiffs could not affect such a case at all. In such a situation the alien's desire to land can be rejected for good reason or bad, for sensible reason or fanciful or for no reason at all. In my judgment if a reason is given, that reason is wholly irrelevant to the right of the complainant, for the reason that I have given, that he has no such right for which he can claim protection. I also would adopt the words of LORD REID referred to by LORD DENNING, M.R., in his judgment, which perhaps I may be permitted to read. They appear in the report of *Ridge v. Baldwin* (1), where LORD REID said:

"Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure, and this has been even held to apply to a colonial judge (*Terrell v. Secretary of State for the Colonies* (2)). It has already been held, I think rightly, that such an officer has no right to be heard before he is dismissed and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason."

And so the immigration officer can refuse leave to an alien seeking to land even though he has nothing against the alien. Counsel for the plaintiffs has reminded us that there are many branches of the law in which giving bad reasons may be fatal to a decision, when giving no reason is a safe course. Those examples, so far as they are familiar to me, are examples of persons who are required to act judicially, but are not required to give reasons, and the best present day example is that of a bench of lay justices sitting as a court of summary jurisdiction. If they return from considering a case and produce a verdict which is consistent with the evidence, but give no reason, their decision is unassailable. If, on the other hand, they come back and give reasons which are invalid reasons, their decision may be upset; but the basis of that result is that they are required to decide judicially as a tribunal, and giving false or bad reasons shows they have not done so. There is no parity between that case and the situation of an immigration officer in dealing with an alien immigrant.

The same principle applies to an alien who is already in this country who seeks an extension of the duration of his landing permit. It is I think important to observe that the terms of art. 5 (3) of the Aliens Order 1953 do not in themselves contemplate an application by the alien. In terms they are a power

(1) 127 J.P. 295; [1963] 2 All E.R. 66; [1964] 1 A.C. 40.

(2) [1953] 2 All E.R. 490; [1953] 2 Q.B. 482.

which the Home Secretary can exercise by notice varying the terms of the landing permit. The variation presumably may be favourable or unfavourable to the alien. No doubt in fact applications for variations are frequently made, as in the present case. But here again the alien who has entered with a permit giving him a period of residence has no kind of right to require an extension of that period. The position is exactly the same as that of a man who takes a lease of a house for three months and wishes to renew it for a further period; the landlord can reject his application out of hand. No question of natural justice or anything of the kind arises, because there is no right in the tenant which can be infringed. So, in my judgment, if aliens such as the plaintiffs in the present case seek a variation of their landing permits by an extension of the period of residence, they are not asserting a right or interest capable of being interfered with, and accordingly they are not entitled to the consideration which is implicit in the argument addressed by counsel for the plaintiffs to us today. It is true, as he pointed out in his reply, that in some of the licensing cases there is an indication that a renewal of a licence raises different considerations from the first grant of the licence, and I fully accept that that may be so in cases where renewal is something which can reasonably be expected by the possessor of the licence and where the facts are such that a refusal of renewal is tantamount to the withdrawal of a right which the applicant legitimately expected to hold; but I see no parallel to that in the present case. I see no reason whatever in the Aliens Order 1953 to suggest that an alien possessing a permit for a limited period of residence has any kind of right to a renewal; and accordingly when he asks for renewal, there is no obligation on the Home Secretary to give reasons which are consistent with the legislation or to act fairly or to do any of the other things for which counsel has contended in this case. Of course, very different considerations may arise on the making of a deportation order. An alien in this country is entitled to the protection of the law as is a native, and a deportation order which involves an interference with his person or property may raise quite different considerations; but a deportation order is not the matter with which we are concerned and I forbear to say more about it.

I agree with the analysis of LORD DENNING, M.R., as to the reasons for refusal in this case and the propriety of the Home Secretary's action. Whether I should have felt that the position on that aspect of the case was clear enough to strike out the statement of claim is another matter. The factor which forces me to conclude that the learned judge's order was right in this case is the fact to which I referred earlier, namely, the absence of any kind of right in the plaintiffs to an extension of their landing permits.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Lawrence Alkin & Co.*

F.G.

COURT OF APPEAL (CRIMINAL DIVISION)

(WINN, L.J., CUSACK AND CAULFIELD, JJ.)

December 20, 1968

R. v. THATCHER

Criminal Law—Evidence—Admissibility—Statement drafted by counsel for defendant—Request that officer in charge of case should witness statement—Submission that statement should be offered to the jury as part of case for the prosecution—Undesirable method of conduct of trial.

The defendant requested that a statement drafted for him by his counsel should be submitted to and signed by the officer in charge of the case, and contended that counsel for the prosecution should be compelled to refer to it in his opening speech.

HELD: this was an attempt to introduce an entirely inappropriate and undesirable method of conduct of criminal trials, and the judge had rightly refused to accede to the application.

APPLICATION for leave to appeal against conviction and sentence.

On 19th July 1968, at the Central Criminal Court before **JUDGE BLOCK**, the applicant, Frederick Arthur Thatcher, a railway servant, was convicted of larceny and sentenced to five years' imprisonment. He appealed against sentence and applied for leave to appeal against his conviction. The case is reported on a question which arose during the trial, viz., the propriety of a request to the trial judge to direct that the applicant's statement of his case be witnessed by a police officer so as to make it admissible in evidence as part of the case for the prosecution, thus forcing the prosecution to put it to the jury at the outset of the trial.

D. A. Jeffreys for the applicant.

WINN, L.J.: Before leaving the matter of conviction, the court mentions only in passing that there was a curious incident which occurred during the trial. At the trial counsel now before the court was not conducting the defence. Other learned counsel was. In the absence of that other learned counsel it would be quite inappropriate to do more than touch on this matter. The matter was this. It was submitted by the learned counsel who was then defending that he was entitled to have a statement, which he had drafted for the applicant on instructions, not only submitted to the police officer in charge of the case but signed by that police officer as a witness, and thereafter employed, obligatorily, by the learned counsel for the prosecution as part of the material which he would open to the jury at the outset of the trial. The court says no more than this. In the circumstances that submission, in the opinion of this court, was quite misconceived. The suggested authority for it, which was sought to be derived from a recommendation of **SALMON, L.J.'s**, **ROYAL COMMISSION ON TRIBUNALS OF INQUIRY** (Cmd. 3121), Nov. 1966, paras. 65 and 109, as to the manner in which a public inquiry under the **Tribunals of Inquiry (Evidence) Act 1921** should be conducted was utterly irrelevant when deciding what is the proper course when conducting a criminal trial. The matter has gained importance only because when a similar submission was made recently at Inner London Quarter Sessions, the deputy chairman then presiding in the case of *R. v. Pine* (1) did see fit to give such a direction in that case. This is the second time, therefore, unsuccessfully on this occasion, that it was attempted to introduce an entirely inappropriate and undesirable method

(1) Oct. 17, 1968 (unreported).

of conduct of a criminal trial, which is, with the exception mentioned, quite without precedent in the annals of criminal trials in this country. The court mentions the matter not by way of rebuke but by way of indication to the Bar and all others concerned that the court would not approve of any repetition of any such attempted procedure. The learned judge, JUDGE BLOCK, was quite right on this occasion in refusing to allow any such submission. [His LORDSHIP then dealt with the appeal against sentence.]

Application refused.

Solicitors: *Registrar of Criminal Appeals* (for the applicant).

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WINN, L.J., AND JAMES, J.)

January 16, 28, 1969

R. v. CLARKE

Road Traffic—Driving with blood-alcohol concentration exceeding prescribed limit—Breath test—Device to be approved by Secretary of State—Production of order signifying approval—"Order"—Breath Test Device Approval (No. 1) Order, 1968 (dated 9th February 1968)—Documentary Evidence Act 1868 (31 & 32 Vict. c. 37), s. 2, as amended by the Documentary Evidence Act 1882 (45 & 46 Vict. c. 9), s. 2.

On a charge of driving a motor vehicle with a blood-alcohol proportion exceeding the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, in order to prove that the Secretary of State had approved the type of device used for a breath test as required by s. 7 (1) of the Act, the prosecution produced a print of a document entitled the Breath Test Device (Approval) (No. 1) Order, 1968, showing that it had been printed and published by the Stationery Office on February 9, 1968, and purporting to be signed by the Home Secretary in pursuance of his powers under s. 7 (1).

HELD: the document was an "order" within the meaning of s. 2 of the Documentary Evidence Act, 1868 (as amended), as the word "order" should be given a wide meaning covering, at any rate, any executive act of government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament; accordingly the approval of the device by the Home Secretary had been proved.

APPEAL by the appellant, James Frederick Clarke, against his conviction at Nottinghamshire Quarter Sessions of driving a motor vehicle with a blood-alcohol concentration above the prescribed limit contrary to s. 1 (1) (b) of the Road Safety Act, 1967. He was sentenced to a fine of £25, or one month's imprisonment in default, and also disqualified for 12 months. He appealed on the ground that the Breath Test Device (Approval) (No. 1) Order, 1968, was *ultra vires*.

S. E. Herman for the appellant.

A. W. M. Davies, Q.C., and T. T. Dineen for the Crown.

Cur. adv. vult.

28th January. LORD PARKER, C.J., read the judgment of the court: In May 1968 at Nottinghamshire Quarter Sessions the appellant was convicted of an offence under s. 1 (1) of the Road Safety Act 1967 in that he had driven a motor vehicle on a road having consumed alcohol in such a quantity that the proportion

thereof in his blood exceeded the prescribed limit of 80 milligrammes of alcohol in 100 millilitres of blood. He now appeals against that conviction on a point of law, namely, that there was no evidence that the device used for the breath tests, known as the Alcotest @ 80, was of a type approved by the Home Secretary. Unless proof of this was adduced by the prosecution then, following the decision of the Divisional Court in *Scott v. Baker* (1), the specimen of blood taken, which showed an excess of alcohol in the blood over the prescribed limit, was not validly required and taken.

The way in which the prosecution sought to prove the Home Secretary's approval of the device used was to produce a print of a document appearing on its face to have been printed and published by H.M. Stationery Office entitled the Breath Test Device (Approval) (No. 1) Order 1968. The document reads as follows:

"In pursuance of the power conferred on me by Section 7 (1) of the Road Safety Act 1967, I the Right Honourable James Callaghan, one of Her Majesty's Principal Secretaries of State, do by this order approve, for the purpose of breath tests as defined in the said Section 7 (1), the type of device described in the Schedule hereto. [It is then signed:] James Callaghan, One of Her Majesty's Principal Secretaries of State. Home Office, Whitehall. 9th February 1968."

The schedule reads:

"The device known as the Alcotest, comprising an indicator tube (marked with the name 'Alcotest'), mouth piece and measuring bag, and supplied to police forces in England and Wales in a container marked with the name 'ALCOTEST @ 80'."

Quarter Sessions ruled that by virtue of s. 2 of the Documentary Evidence Act 1868 (as amended by s. 2 of the Documentary Evidence Act 1882) the production of this document was prima facie evidence of the Home Secretary's approval of the device in question, and it is this ruling which is challenged in this appeal. Provision for the approval of the device appears in s. 7 (1) of the Road Safety Act 1967, which provides that:

"'Breath test' means a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out, by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person."

It will be seen therefore that there is an absence of any further provision to the effect that the device is to be "approved", or "fixed" or prescribed by order or regulation. Indeed in this respect the words are in striking contrast to the definition in the same subsection of "the prescribed limit" which

"means 80 milligrammes of alcohol in 100 millilitres of blood or such proportion as may be prescribed by regulations made by statutory instrument by the Minister."

It is however conceded—and in the opinion of this court rightly conceded—that the Secretary of State not only has the power but also the duty to approve a type or types of a device to be used for breath tests. What Parliament has not done is to lay down the form of the approval or the method of publication so as to bring the approval to the attention of all concerned. That is a matter left entirely to the Secretary of State.

(1) 132 J.P. 422; [1968] 2 All E.R. 993.

The question here is whether the form and the method used by the Home Secretary to publish his approval is one which attracts the provisions of the Documentary Evidence Acts 1868 and 1882. Section 2 of the Act of 1868 provides as follows:

"Prima facie evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of modes herein-after mentioned; that is to say . . . (2) By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the Government printer . . ."

And by s. 2 of the Act of 1882 the production of such proclamation, order or regulation shall have the like effect ". . . if it purports to be printed under the superintendence or authority of Her Majesty's Stationery Office."

The point in issue therefore is whether the document entitled the Breath Test Device (Approval) (No. 1) Order 1968 is an "order" within the Documentary Evidence Act 1868. That the Home Secretary had power to make and sign the original document is we think clear. Moreover, his act in so doing was a public act and the document was a public document, being a document "made for the purpose of the public making use of it, and being able to refer to it", cf., LORD BLACKBURN in *Sturla v. Freccia* (1). In these circumstances there would seem no reason why the document should not in form order that the prescribed device should be that specified in the document.

It is submitted on behalf of the appellant that it is not because it is not a statutory instrument. This, however, is clearly not the test since, by s. 1 of the Statutory Instruments Act 1946, an order properly made under a power conferred by an Act passed since 1946 is only a statutory instrument if the statute conferring the power provides that it is to be exercised by statutory instrument. There can be and are many orders which are not statutory instruments. It is secondly submitted that the only document which can constitute an order under the Act of 1868 is one which amounts to subordinate or delegated legislation pursuant to specific authority conferred by statute. It is, however, clear that s. 2 of the Act of 1868 is wider. The reference to orders issued by Her Majesty and by the Privy Council shows that prerogative and executive acts are contemplated. There would seem no good reason for giving the word "order" any narrower meaning when issued under the authority of a government department or officer. Moreover, bearing in mind that in 1868 there were no statutory rules and orders, let alone statutory instruments, the court is satisfied that the word "order" in the Act should be given a wide meaning covering at any rate any executive act of government performed by the bringing into existence of a public document for the purpose of giving effect to an Act of Parliament. This is all the more so when the Acts in question are merely designed to facilitate proof of matters which can be clearly proved otherwise, albeit in a less convenient manner. Accordingly, the court is satisfied that the approval of the Home Secretary was proved and that the appeal should be, and it is, dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; J. J. Spencer & Son, Kirby-in-Ashfield.*
T.R.F.B.

(1) (1880), 44 J.P. 812; [1874-80] All E.R. Rep. 657; 5 App. Cas. 623.

COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON AND PHILLIMORE, L.JJ., AND LAWTON, J.)

January 23, 30, 1969

R. v. LOMAS

Criminal Law—Appeal—Fresh evidence—Admission of fresh evidence of scientific or medical opinion—Pathologist—Inability to obtain evidence of eminent pathologist at trial—Criminal Appeal Act, 1968 (c. 19), s. 23.

Only in most exceptional cases will the court receive under s. 23 of the Criminal Appeal Act, 1968, fresh evidence of scientific or medical opinion, as it can very rarely be successfully contended that there is a reasonable explanation for such evidence not having been adduced at the trial.

Where, however, on a charge of murder the case for the Crown at the trial rested substantially on the opinion of a pathologist on one particular point, and the defendant's advisers had taken steps to obtain the evidence of an eminent medical expert who, through unforeseen circumstances, was unable to attend, and the pathologist whom they did call was unable to challenge the evidence of the prosecution,

HELD: as it subsequently appeared that the evidence of the medical expert called for the Crown could be challenged by that of an expert of equal standing, the court would, in the interests of justice, admit fresh evidence from the last-mentioned expert.

APPEAL against conviction by Arthur James Lomas, who had been convicted at Hampshire Assizes before MILMO, J., of the murder of his wife, and sentenced to life imprisonment.

John Hall, Q.C., and D. C. Calcutt for the appellant.

J. H. Inskip, Q.C., and M. Dyer for the Crown.

Cur. adv. vult.

30th January. FENTON ATKINSON, L.J., read this judgment of the court: On 25th July, 1967, at Hampshire Assizes the appellant was convicted of the murder of his wife and was sentenced to life imprisonment. This court heard his application for leave to appeal on 23rd January, 1969, when we granted the application, indicating our intention to substitute a conviction for manslaughter, and adjourning the further hearing of the appeal until today to give his counsel a full opportunity with his client present to deal with matters of mitigation.

The appellant is a man of 50, who lived with his wife and 25-year old daughter Heather at Wiveliscombe, Somerset. On the evidence he was a man who frequently drank too much and when in drink used to behave, as his daughter put it, "horribly" to her and her mother. There was evidence of some previous assaults on his wife and also that on occasions the two of them locked themselves away in a room to keep away from him. On 27th April, 1967, he returned home from a public house about 2.45 p.m. the worse for drink, though the licensee of the public house where he had been said he had often seen him much worse. His wife and Heather then went out for a walk, returning at 4.0 p.m. The appellant was then in the garden of the house and was abusive, but he was given his tea and then went out drinking again with a friend who said that he left for home after an hour or so "half sozzled" but no worse than usual. When he came in, his behaviour was so objectionable and abusive that his wife and daughter decided to go out and leave him to it. The daughter went upstairs for three minutes or so. She could hear her father carrying on in the same sort of way and then heard a thud from the room below. She came down and found her mother lying on her back on the floor with her head partly under a table. Her description was this:

"My mother was lying on the floor, I saw her feet stretched out . . . My father was bending over her, and his hands were around her throat, and his hands were not still, they were shaking."

She was asked: "Was he doing anything else other than shaking?" and she said: "He slapped her face a couple of times."

A neighbour and the police were called. The family doctor arrived shortly and found the wife was dead. The appellant was certainly under the influence of drink though he sobered up fairly quickly and was able to do a couple of simple tests for the doctor. The prosecution did not suggest an intention to kill, but submitted that the medical evidence entitled to the jury to infer an intent to do really serious injury.

This submission was based on the evidence of a pathologist, Dr. Hunt, who made a post-mortem examination, and the case of murder as opposed to manslaughter was founded entirely on his evidence, or to be more precise his opinion on one particular point. He found a small bruise at the back of the head, probably caused by contact with the floor. This had nothing to do with the cause of death, which he said was compression of the neck. He preferred not to call it strangulation because, as he very fairly said, he had never seen a case of death from such a cause with less outward or internal signs of injury. He found one small bruise on the neck, but he also found a number of petechial haemorrhages under the eyes and ears which he said led him to the opinion that there had been firm continuous pressure on the deceased woman's neck maintained for a minimum period of 30 seconds. He adhered to this position throughout his evidence. Although the defence had the assistance of an expert pathologist, he was never called, so that Dr. Hunt's opinion as to the 30-second period standing unchallenged became the cornerstone of the prosecution case.

The appellant himself gave evidence that he had no recollection whatever of the events of that evening. Suggestions were made on his behalf of possible accident or that the wife, having hit her head in a fall, the compression of the neck might have been caused by the clumsy efforts of a drunken man to revive her, but Dr. Hunt rejected any such suggestions. It was inevitable in the circumstances that Dr. Hunt's evidence of at least 30 seconds firm continuous pressure of the neck should loom large in the summing-up, as being the one piece of evidence pointing clearly to an intention in the mind of the appellant to cause really serious injury to his wife. Certain criticisms have been made of the summing-up, particularly on the issue of drunkenness as negating the necessary intent and on the issue of accident. It is not now necessary to deal with those criticisms beyond saying that in our view they were not well founded and no valid criticism of the summing-up was possible. If the matter stopped there, this court would have found it impossible to say that the verdict of the jury was unsafe or unsatisfactory and, in fact, no submission to that effect was made by counsel for the appellant. At the same time, each member of the court on reading the papers felt that a verdict of guilty of manslaughter would have met sufficiently the real justice of the case and the prosecution would in fact have accepted a plea to the lesser offence.

It was against this background that counsel for the appellant asked for leave to call fresh evidence. The witness he desired to call was a distinguished pathologist Dr. Mant, who is a reader in forensic medicine at London University and a pathologist at Guy's Hospital. He was first consulted in the summer of 1968 and had had the opportunity of reading the whole of the evidence, consulting with Dr. Hunt and the defence pathologist and seeing the neck structures which had been preserved by Dr. Hunt. As a result of his study of the case, he disagreed

profoundly with Dr. Hunt on the one vital medical issue. He agreed that death was due to compression of the neck, but said that there was no evidence to support Dr. Hunt's view of firm continuous pressure for at least 30 seconds. In his view, the compression causing death could well have been for a very few seconds only.

The calling of fresh evidence in this court is now governed by s. 23 of the Criminal Appeal Act, 1968, and, where such evidence is tendered to this court it is provided by s. 23 (2) that the court shall receive that evidence—

"... unless they are satisfied that the evidence, if received, would not afford any ground for allowing the appeal... if—(a) it appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal [clearly the proposed evidence satisfied that requirement] and (b) they are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it."

Having regard to that last provision, it is material to see why Dr. Mant or some other pathologist of equal stature was not approached before the trial. We have an affidavit by the appellant's solicitor setting out the facts. He states that he represented the appellant from the start of these matters, and he goes on as follows:

"The appellant was committed for trial... on 27th June 1967. I received the depositions on 29th June. I immediately consulted the leading and junior counsel who were subsequently briefed at the trial and they recommended that the evidence of a pathologist would be required for the defence. I first approached Professor F. E. Camps of The London Hospital asking him to attend a consultation with counsel on 3rd July. He was unable to find time to read the papers or to attend the consultation or personally to accept instructions but sent an assistant, Dr. J. M. Cameron, to the consultation. Dr. Cameron duly attended the consultation at which the case was discussed."

Pausing there, we do not know the result of that consultation, but it seems pretty clear that Dr. Cameron was not thought to be likely to be of assistance to the defence, because the affidavit continues:

"Following the consultation, counsel advised me to approach another leading pathologist, Dr. R. D. Teare of St. George's Hospital. I did so by letter dated 7th July. On 10th July, he telephoned me, regretting that he was too fully occupied to accept instructions, but saying that he would hand the papers to one of his assistants."

The assistant duly attended a consultation with counsel on 12th July and reported in writing on 14th July. In a covering letter he gave information about himself. He was an M.B., B.S., D.M.J., he was a lecturer in forensic medicine, a research assistant in forensic medicine, he had been a pathologist for five years and a forensic pathologist for only two years. The affidavit continues:

"Counsel advised that had time allowed it would have been preferable to obtain the services of a pathologist of greater experience, but the trial was imminent and it was clearly impossible to obtain the services of a leading pathologist at such short notice. When Dr. Hunt had completed his evidence at the trial, leading counsel asked [his proposed expert] in my presence whether there was anything in Dr. Hunt's evidence that he... would dispute and he said that there was not. He added that he could not think of any matters favourable to the [appellant] to which Dr. Hunt had not already referred in his evidence, either in the course of examination-in-chief or

cross-examination. It was in these circumstances that the decision was taken not to call [him]."

This court was most reluctant to allow this fresh evidence to be given. The normal case where fresh evidence is tendered and received under this section is on a question of fact, where, for example, some eye-witness or alibi witness not previously available has later been discovered. Although the section in its terms appears wide enough to embrace fresh evidence of scientific or medical opinion, it seems to this court that only in most exceptional cases would it be possible to say that there was any reasonable explanation for not adducing such evidence at the trial, and it is said with force by counsel for the Crown that if the defence are content to go into the trial with a somewhat inexperienced pathologist, without asking for an adjournment to secure the assistance of a more experienced pathologist, they should not be allowed in this court to have a second chance. Counsel asked rhetorically, if this application were allowed, where is it to stop? However, in this case we decided to admit the evidence. We think the appellant's advisers took reasonable steps to secure the necessary medical evidence before trial and had from their proposed witness a report, which in certain important respects assisted their case, and it was reasonable, particularly with the Long Vacation about to begin, not to ask for an adjournment to obtain the advice of a more experienced pathologist. They could not foresee that when the time came their expert would find himself unable to disagree in any respect with Dr. Hunt. When defending counsel learned during the prosecution's case that the pathologist whom he had hoped to call could not disagree in any respect with Dr. Hunt, he could have asked for an adjournment, but it would have been unrealistic to have expected him to have done so in the circumstances. We think further that on the facts of this case, particularly the fact that injury to the tissues of the neck was so slight, justice required that if the medical opinion of Dr. Hunt on the one single point which was the sole foundation for the charge of murder could now be challenged by a pathologist of equal standing, the appellant should be allowed to call such evidence. But just as the Court of Criminal Appeal which allowed fresh medical evidence to be called on appeal in *R. v. Harding* (1) stressed the wholly exceptional nature of the course they took, so we regard this as an exceptional case depending on its own special facts and not as a decision giving any encouragement to similar applications in other cases in the future.

Having heard Dr. Mant, we are sure that if his evidence had been given at the trial, the jury could not properly have convicted of murder or, alternatively, if they had done so, the verdict would have been most unsafe and unsatisfactory. At the same time, we can see no escape from the conclusion that the jury must have been satisfied of facts proving the appellant guilty of manslaughter, namely, that the appellant deliberately assaulted his wife without any sort of excuse by seizing her by the throat and in a manner involving obvious risk of injury by compressing her neck in a manner which caused her death. It follows, in our judgment, that under the provisions of s. 3 of the Act of 1968 a verdict of guilty of manslaughter should be substituted for the verdict of guilty of murder. [Counsel for the appellant then addressed the court on the question of sentence.] We have considered all that counsel has to say by way of mitigation. The facts of the case have been sufficiently set out in the judgment already delivered, and we think the right sentence to be substituted for the sentence of life imprisonment is one of five years' imprisonment.

Sentence varied.

Solicitors: *Moger & Couch*, Wiveliscombe; *Director of Public Prosecutions*.

T.R.F.B.

COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, M.R., DAVIES AND WIDGERY, L.JJ.)

January 27, 28, 1969

R. v. TRENT RIVER AUTHORITY AND ANOTHER. *Ex parte* NATIONAL COAL BOARD

Land Drainage—Rating—Exemption—"Portion" of district of drainage board—Mine workings—No benefit from drainage of district—Land Drainage Act, 1930, s. 24 (7).

Mine workings 1,300 feet below ground held (by LORD DENNING, M.R., and DAVIES, L.J., WIDGERY, L.J., dissentiente) to be a "portion of the district" of a drainage board within s. 24 (7) of the Land Drainage Act, 1930, and so, if they got no benefit from the drainage of the district, might be wholly exempted by order of the drainage board from drainage rating.

APPEAL by the National Coal Board, from an order of a Divisional Court of the Queen's Bench Division (LORD PARKER, C.J., ASHWORTH and BLAIN, JJ.), reported 132 J.P. 344, dismissing a motion for certiorari to remove into the High Court and quash a decision given by the Trent River Authority whereby they dismissed the appeal of the board against the refusal of the Newark Area Internal Drainage Board, to make an order under s. 24 (7) of the Land Drainage Act, 1930, exempting from drainage rates a portion of their district comprising land situated more than 500 ft. below the surface, and containing certain underground coal workings of the board.

D. G. Widdicombe, Q.C., and M. F. C. Fitzgerald for the National Coal Board.
Hugh Forbes, Q.C., and Michael Mann for the Trent River Authority.
W. J. C. Tonge for the Newark Area Internal Drainage Board.

LORD DENNING, M.R.: In some of the low-lying areas of England there are drainage boards who are allotted particular districts. Their task is to stop flooding of land in their district and save it from harm. These drainage boards have power to levy rates on the occupiers of hereditaments in their district. The question in this case is whether the National Coal Board have to pay drainage rates on some of their workings.

The point arises in regard to Calverton Colliery in Nottinghamshire. The pit head and colliery buildings are outside the drainage district altogether. They are over a mile away. So they are not liable to the drainage rate. But the question is as to the workings underground. These are 1,300 ft. below the surface and go for two or three miles. They extend so far that, after the first mile, they lie directly below land which is within the drainage district. Between these underground workings and the surface there is a very thick band of impermeable strata. It is so strong and thick that no water can get through it—unless it be broken by an earthquake or an atomic explosion. So the underground workings get no benefit at all from the surface drainage. The second respondents, the Newark Area Internal Drainage Board, claim rates on these underground workings, that is, on so much of them as fall within their district. But the Coal Board object. They say that, as they get no benefit from the drainage of the district, they should not have to pay the drainage rates. These proceedings have been brought to test the legal position. The Coal Board claimed exemption under s. 24 (7) of the Land Drainage Act 1930. Their claim was rejected by the drainage board. The Coal Board appealed to the first respondents, the Trent River Authority, under s. 27 of the Land Drainage Act 1961. The first respondents rejected the appeal, but gave their reasons in writing. They gave their reasons, that is, by a

"speaking" order. The Coal Board said that the reasons were wrong in law and challenged the decision by certiorari. The Divisional Court upheld the first respondents; the Coal Board appeal to this court.

We have to consider, then, a little-known branch of the law. The foundation of all land drainage law is to be found in the Statute of Sewers passed in 1531 in the reign of Henry VIII. That statute set up bodies to see to the proper drainage of low-lying lands. They were called Commissioners of Sewers and were empowered to levy rates on the occupiers of hereditaments in the district. The statute did not expressly make any exceptions, but the courts consistently held that—

"no land is subject to a drainage rate unless it has derived or will derive benefit, or has avoided or will avoid danger by reason of the operations."

Put shortly, the principle was established of: "No benefit: no rates". The learning on the subject is to be found in a reading delivered at Gray's Inn in 1622 by "the famous and learned Robert Callis". He says that the exemptions "though not expressed in words, are yet supplied in reason and are to be added in construction": see *CALLIS ON SEWERS* (4th Edn.) pp. 264, 265, and *DOBSON AND HULL ON THE LAND DRAINAGE ACT 1930*, pp. 1-7. The modern law is to be found in the Land Drainage Act 1930. It contains the same principle of no benefit: no rates; but it applies that principle only to districts, or portions of districts. So far as districts are concerned, s. 1 (5) provides that:

"The districts . . . to be constituted as drainage districts under this Act shall be such areas as will derive benefit or avoid danger as a result of drainage operations."

So far as portions of districts are concerned, s. 24 (7) provides that:

"A drainage board . . . may by order determine that no rates shall be levied by them on the occupiers of hereditaments in any portion of the district which, in their opinion, either by reason of its height above sea level or for any other reason, ought to be exempted wholly from rating."

That subsection clearly imports that there ought to be exemption from rating for those portions of the district which derive no benefit. *DOBSON AND HULL* in their commentary on that section rightly state that the words "any other reason" should be read *eiusdem generis* with the height above sea level. Such a reason, they state, must be founded "on some physical characteristic of the area the effect of which is that no benefit will accrue to it from the expenditure of the money" (see p. 42).

The Coal Board rely on that principle here. They say that these underground workings, or rather the layer of land 1,300 ft. below ground, is a "portion" of the district, and, as it derives no benefit, it should pay no rates. The second respondents and the first respondents both admit that this layer of land derives no benefit; but they say that it is not a "portion" of the district. They say a portion of the district means a portion of the surface of the land and does not extend to a portion underground. I cannot for myself accept this contention. It seems to me that a "district" or a "portion" of a district is not limited to the surface of the land. It includes the ground underneath down to the depths of the earth, and also the air above up to the height of the atmosphere. In one respect the second respondents accept this view, because they seek to levy rates on these underground workings which are 1,300 ft. below the surface. They recognise, therefore, that they are "hereditaments in the drainage district" within s. 24 (3) so as to be liable for rates. If they are hereditaments within the district for the purpose of having rates levied on them, they also to my mind are a "portion" of

the district for the purpose of obtaining exemption. In the course of the argument I put the case of a mountain with a tunnel through it. The top of the mountain should be exempted from drainage rates because it derives no benefit, but the tunnel should be liable to drainage rates because it does derive a benefit. An equitable division can only be made by dividing the land into portions horizontally. The top of a mountain should be exempt because it derives no benefit. The tunnel should be liable because it does derive benefit.

In my opinion, the second respondents ought not to have refused the request of the Coal Board for exemption. I think that the first respondents were wrong in point of law in holding that this layer of land was not a "portion" of the district. I think that it should be held to be exempt, as it derives no benefit. I would, therefore, allow the appeal.

DAVIES, L.J.: The words in which the first respondents, the Trent River Authority, or, rather, their sub-committee, expressed their view on the appeal by the National Coal Board, were as follows:

"The example cited in s. 24 (7)—namely, height above sea level—can, in our view, relate only to the surface of land and our conclusion is that any order sought under the section must relate to an area of surface land. We hold, therefore, that the order sought by the National Coal Board cannot properly be made and the appeal accordingly fails."

I confess that I have to some extent a slightly uneasy feeling that the conclusion to which I feel driven in accordance with the view just expressed by LORD DENNING, M.R., may possibly be too simple, but I find it impossible to escape from it.

Section 24 (3) of the Land Drainage Act 1930, so far as relevant, provides as follows:

"Every owner's drainage rate and every occupier's drainage rate shall, subject as hereinafter provided, be assessed and levied by the board on the occupiers of hereditaments in the drainage district in accordance with the provisions of this section . . ."

The material words, and the important words, there are "hereditaments in the drainage district". The second respondents and the first respondents admit—indeed, they aver, as they have to—that, for the purposes of levying the rate, these underground workings are a hereditament or hereditaments in the drainage district. But, when it comes to the application of s. 24 (7), the exemption subsection, they take a different view. That subsection provides that:

"A drainage board, after consultation in the case of an internal drainage board with the catchment board, may by order determine that no rates shall be levied by them on the occupiers of hereditaments in any portion of the district which, in their opinion, either by reason of its height above sea level or for any other reason, ought to be exempted wholly from rating."

Having insisted that the hereditament or hereditaments is or are in the drainage district for the purpose of sub-s. (3), they take the view that, for the purposes of sub-s. (7), the hereditament or hereditaments is or are not in any portion of the district. That seems to me quite impossible. In effect, what has been done is to read three words into sub-s. (7), which would, therefore, read as follows: "no rates shall be levied by them on the occupiers of hereditaments in any portion of the *surface of the district*". Those words are not in the section, and it seems to me quite unavoidable to say that, if the hereditament is in the district, it must necessarily be in a portion of the district. If it is not in a portion of the district, then it is not in the district, and so the rate could not be levied.

The effect of the decision as it stands, as I see it, is that the surface and all the underlying land are in the district for the purpose of being rated, but, when one comes to consider sub-s. (7) and the question of exemption from rates, one ignores all the underlying land, the subsoil, and confines one's attention to the surface. As I say, it may be that this is, perhaps, too facile an approach to the interpretation of the section, but, as I have said, in my view, the conclusion is quite irresistible, and on that short ground, which is, in effect, the same as that of LORD DENNING, M.R., I agree that this appeal should be allowed and that the matter should go back to the second respondents or to the first respondents, whichever is appropriate, to consider the case on its merits on the interpretation of the law which the majority of this court has put on it.

WIDGERY, L.J.: I have the misfortune to differ from my Lords, and, needless to say, I do so with diffidence. I am somewhat reinforced, however, by the fact that my views are in accord with the unanimous decision of the Divisional Court.

It has always been a feature of the law of land drainage rating that the burden should be placed on those whose lands benefit from the drainage works, but whereas, under the Statute of Sewers 1531-32, an exemption on the ground of non-benefit could be claimed by the occupier of an individual hereditament, the draftsman of the Land Drainage Act 1930 has used a broader brush. Under the Act of 1930, all occupiers of land within a drainage district are *prima facie* liable to be rated on the annual value of the land regardless of the degree of benefit which they enjoy. And there is good sense in this. In any low-lying district there are some fields which are always dry; but all landowners in the district benefit from drainage work in some degree by the prevention of flooding of roads and bridges which are in common use. Although there is no reason in law why a portion of the district in s. 24 (7) should not comprise a single hereditament, the general intention of the Act, in my opinion, is to grant or refuse exemption on a wider basis. These factors do not directly assist in the solution of the present problem, but they do show that, on the broad approach of the Act of 1930, there may well be some individual landowners within a drainage district who are not exempt from drainage rates even though the direct and obvious benefit to their land is minimal. In the present case, the Coal Board contend that, when prescribing a portion of the district for exemption under s. 24 (7), the second respondents may make a horizontal division exempting all substrata which lie more than 500 ft. below the surface. The respondents contend that the division must be a vertical one, the limits of which are apparent on the surface of the land. I think that the respondents are right. It is clear from s. 5 that a catchment area is an area which can be delineated on a map, and in common sense a drainage district should be the same. A drainage district is sometimes a part of a catchment area (see s. 81); and sometimes the two areas are coincident (see s. 1 (4)). In any event a drainage district is an "area" (see s. 1 (5))—the dictionary meaning of which word includes "level space", "vacant ground", "superficial extent", or "tract". In the context of the present Act, I am satisfied that a drainage district is an area which can be delineated on a map, and *prima facie* a portion of the drainage district is an area which can be similarly defined. The truth of the matter may be that Parliament regarded drainage works as works which affected the surface of the land and did not apply its mind to underground workings. If consideration had been given to underground workings, I am by no means satisfied that they would have been given special treatment. If the headworks of the mine in the present case had been within the district, the case for exemption would disappear, and I do not think that Parliament would have given special consideration to the

Coal Board merely because the access to their workings was just outside the boundaries of the district. Nor do I think that the example given in argument of a railway tunnel piercing a hill is wholly realistic because the Act of 1930 is to apply in the low-lying districts of England and Wales and not in the Swiss Alps, and I doubt whether any such hill would be large enough to merit exemption in itself as a portion of the drainage district within s. 24 (7).

Accordingly, I find myself in agreement with the judgment of the Divisional Court, and I would dismiss the appeal. In the circumstances, I agree with what has been said by DAVIES, L.J., that the matter should go back to the respondents for reconsideration in the light of this court's view on the construction of s. 24 (7).

Appeal allowed.

Solicitors: *Donald H. Haslam; Ian Drummond*, Nottingham; *Hancock & Willis*, for *Tallents & Co.*, Newark.

F.G.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(SIR JOCELYN SIMON, P., AND BRANDON, J.)

January 29, 1969

HIND v. HIND

Husband and Wife—Charges of adultery, reasonable belief in adultery, and conduct amounting to expulsive conduct—Need for particulars of charges.

Where, in a matrimonial case before justices, one spouse's case is that the other spouse has committed adultery, or that the complaining spouse has reasonable grounds for believing that adultery has been committed, or that a male spouse has been guilty of conduct in relation to women so inconsistent with the married relationship as to amount to expulsive conduct, particulars of the charge must be given to the party charged by the party making the charge.

Per SIR JOCELYN SIMON, P.: The reason why particulars of adultery must be given, however the case is framed, are twofold. In the first place, a third party may well be concerned and it may well be that the third party will be needed as a witness, and, secondly, any case of adultery raises inevitably a whole number of concomitant questions, like condonation, connivance, and conduct conducing. The rule is not confined to an allegation of adultery, but extends to where a party's case is based on a reasonable belief in adultery. However that contention is framed or however it arises, notice must be given that that is the case. It need not be particularised in the same detail as an actual charge of adultery, but sufficient notice of it must be given so that the spouse who is charged knows what case he has to meet, that any party involved can be called as a witness, and that all parties and the court are alerted as to issues of condonation, connivance, or conduct conducing. It is not sufficient to make an oral communication.

When the case is neither adultery nor a reasonable belief in adultery, but a charge of conduct in relation to other women so inconsistent with the married relationship as to amount to expulsive conduct I am very reluctant to impose on parties before a magistrates' court the burden of detailed pleadings, but I think the same reasoning that applies to notice of a charge of adultery or of a charge of reasonable belief in adultery applies equally to this third category of conduct.

APPEAL by the husband from a decision of Bolton county justices finding the wife's complaints of desertion and wilful neglect to provide reasonable maintenance for herself proven and dismissing complaints of persistent cruelty and wilful neglect to maintain the child of the marriage.

J. M. Lever for the husband.

H. S. Singer for the wife.

SIR JOCELYN SIMON, P.: This is an appeal by the husband against a decision of the Bolton county justices of 1st October 1968. They had before them complaints by the wife that the husband had treated her with persistent cruelty and had wilfully neglected to provide reasonable maintenance for her and the child of the marriage. There were in fact two children, one of whom was born after the separation and the issue of the summons. The justices also had before them a complaint by the wife that her husband had deserted her on 23rd April 1968. They found the charges of desertion and wilful neglect to provide reasonable maintenance for herself proven; they dismissed the charges of persistent cruelty and wilful neglect to maintain the child; and they made a custody and maintenance order. Since we think that there must be a re-hearing, I desire to say as little as possible about the facts of the case. Certainly, nothing I do say, nor the fact that I think that there must be a re-hearing, must be taken as implying any opinion as to what might be its likely outcome.

The parties were married in March 1966. The husband seems to have been reluctant to marry, and in June 1966, on his own admission, he committed adultery, though the woman was not identified. In September 1966, the husband quarrelled with his mother-in-law, a quarrel which was not made up for many months. In October 1967, the wife withdrew from cohabitation with the husband and went to join her parents at Blackpool, staying there some six to eight weeks. While she was there, apparently on 22nd October, she issued a summons making complaints in the Blackpool Magistrates' Court. However, we know nothing of the terms of that summons or the nature of the complaints, because it seems never to have been served on the husband. Instead, the parties became reconciled, and the wife returned to Bolton and lived with her husband there in or about November 1967. On 11th April 1968, according to the wife, the husband confessed to her that he had committed adultery in June 1966. The wife had been suspicious as to the husband's association with another woman at the time, that is to say in June 1966, but her case was that she did not know that it was an adulterous association until the husband confessed it on 11th April 1968. The husband's case, on the other hand, was that the wife knew the previous summer (1967) that he had committed adultery the year before and that she had continued to live with him in that knowledge. The justices, when they had to address their minds to the divergence of evidence, preferred the evidence of the wife. Immediately after that alleged confession, the parties went together to Blackpool, where they stayed with the wife's parents. The circumstances of that stay, which was over Easter 1968, were not, in my view, really investigated. On 23rd April, I think—there is some discrepancy as to the date—there was a conversation between the husband and the wife, in which a woman who was called "a girl who worked at a local hotel", was referred to as a woman with whom the husband had been associating, and the wife's case was that the husband admitted that, and added that he did not really want the wife any longer as a wife. That determined the wife to go, although the actual departure was not until the beginning of May 1968. However, the wife had already, on 24th April, issued her summons alleging constructive desertion and persistent cruelty.

It must be obvious from what I have said so far that the wife could have alleged adultery in her summons: see the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 12 (1). We were told that the reason she did not do so was because the only evidence of adultery she had was the oral confession of her husband. I am not, as at present advised, convinced of the cogency of that consideration, and I am clearly of the opinion that, where a party's real case is that the other spouse has committed adultery, or that he or she has reasonable

grounds for believing that adultery has been committed, that should be made explicit. Certainly a case of adultery should no more be dressed up as a case of constructive desertion than a case of persistent cruelty should be: cf. *Pike v. Pike* (1).

Before the case came on for hearing, there were telephonic communications between the solicitors on each side. Unfortunately, though understandably, their recollections differ as to what was said. Certainly something was said as to the wife's case of constructive desertion, certainly something was said as to the other women. It is unnecessary, in my view, even were it possible, to resolve the differences of recollection; because in a case of this sort what is required is sufficient notice of the real nature of the case and that it should be in writing. Unless it is in writing, one is almost bound to get the sort of confusion which arose in this case.

The course which the case took was this. The wife gave evidence, but said nothing about the weekend in Blackpool over Easter 1968 in her evidence in chief. Indeed, since all concerned had their eyes firmly fixed on the question whether the adultery had been condoned by having been known since 1967, it must have been at a very late stage, if at all, that the full significance of the cohabitation at Blackpool became apparent.

The justices, although they found that the husband had used violence to the wife, found that on only one occasion could it be properly described as an act of cruelty. Moreover, they did not find any act of cruelty occurring within the period of six months preceding the complaint: see the Magistrates' Courts Act 1952, s. 104. They, therefore, dismissed the complaint of persistent cruelty. However, they found, as I have said, that the husband had deserted the wife. Asking themselves whether the husband's conduct was such as to justify the wife in leaving him, their conclusion was that, looking at the husband's conduct throughout the marriage, he was in effect guilty of expulsive conduct.

I have indicated already that I do not think that some crucial issues in this case were investigated. I am disinclined to ascribe blame to any particular person or body of persons for that; but I am quite clear that it originated in the failure to give notice that the wife's real case was, first, that the husband had committed adultery and, secondly, that he had associated with other women. I will come back to the word "association" in a moment. But first of all I would like to read a passage from the judgment of KARMINSKI, J., in *Jones v. Jones* (2). He said: "The matter not having been formulated rapidly became a hopeless tangle of undefined issues". What he said there, and in the passage following, seems to me to apply precisely to this case.

In his helpful and able argument in support of the justices' findings, counsel for the wife formulated as the first question we have to determine: Must particulars of adultery be given however the case is framed? I think that without any doubt that question must be answered in the affirmative. That has been decided in a whole line of authorities, culminating in *Jones v. Jones* (2), which are binding on us. Indeed, in one of the cases, *Duffield v. Duffield* (3), LORD MERRIMAN, P., and ORMEROD, J., seemed to regard the failure to give proper notice of a case of adultery as going to the root of adjudication, so that it is no answer to say the other party was not really taken by surprise.

I think that the reasons why particulars of adultery must be given, however the case is framed, are twofold. In the first place, a third party may well be concerned and it may well be that the third party will be needed as a witness, and,

(1) [1953] 1 All E.R. 232; [1954] P. 81.

(2) 118 J.P. 563; [1954] 3 All E.R. 476, n.

(3) 113 J.P. 308; [1949] 1 All E.R. 1105.

secondly, any case of adultery raises inevitably a whole number of concomitant questions, like condonation (which was in question here), connivance and conduct conducing: see the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2 (3) (a). If that is right, it seems to me to follow—and, indeed, this too is governed by authority—that the rule is not confined to an allegation of adultery, but extends to where a party's case is based on a reasonable belief in adultery. However that contention is framed or however it arises, notice must be given that that is the case. It is true that it need not, on the authorities, be particularised in the same detail as an actual charge of adultery, but sufficient notice of it must be given so that the spouse who is charged knows what case he has to meet, that any third party involved can be called as a witness, and that all parties and the court are alerted as to issues of condonation, connivance or conduct conducing which might also arise under this head as well as under a charge of adultery itself. I have made it plain, I hope, that it is not sufficient to make an oral communication. The reason for that is that there is then nothing that can be presented to the court as defining the issues before it, and also the risk of misunderstanding, which I think occurred in the present case.

That brings me to the third class of charge, namely, when the case is neither adultery nor a reasonable belief in adultery, but a charge of conduct in relation to other women, albeit not giving rise to a reasonable belief in adultery, but nevertheless so inconsistent with the married relationship as to amount to expulsive conduct. I am very reluctant to impose on parties before a magistrates' court the burden of detailed pleadings such as are appropriate in the High Court: compare *Frith v. Frith* (1). Nevertheless, I think that the same reasoning that applies to notice of a charge of adultery, however framed and however arising, and notice of a charge of reasonable belief in adultery, however framed and however arising, applies equally to the third category of conduct which I have been referring to.

Certainly, detailed particulars would be inappropriate, but I think that general notice of the case which is to be made is required. It was not given here, with the result that two important matters failed, in my view, to be sufficiently investigated. The first was the nature of the cohabitation at Blackpool over Easter 1968, and the second is what happened on 23rd April—how exactly the subject of the woman at the public house arose, and what exactly the husband is alleged to have said. Later conduct relied on as the final expulsion can certainly only be judged in the light of the earlier conduct. But it must itself be precisely determined in order to decide whether it is finally expulsive—whether, as is sometimes put in a proverbial expression, it can properly be regarded as the final straw which breaks the camel's back.

Although those matters were not, in my view, sufficiently investigated, although proper notice of the nature of the case brought by the wife was not, in my judgment, given, nevertheless, counsel for the wife put his case alternatively in this way. Even leaving aside the question whether the husband's adultery in June 1966 was condoned by the cohabitation in Blackpool over Easter 1968 (as to which, however, he claimed a finding in his favour), even accepting that, if there was condonation, then it would not only be of the adultery in 1966, but of all antecedent misconduct alleged. Even accepting that the adultery of 1966 once condoned could not be revived, nevertheless, there was sufficient left susceptible of revival to be considered as part of expulsive conduct on the part of the husband culminating on 23rd April 1968. Indeed, said counsel for the wife, the justices, in finding that the husband was guilty of constructive desertion, seem to have



discounted the admitted adultery, which, therefore, becomes irrelevant. What he says is that the justices in effect found that the husband's words on 23rd April in all the circumstances were the factor that expelled the wife; there was material on which they could so find; and, therefore, this decision should stand. Alternatively, he said, this court can itself draw conclusions of secondary fact from the findings of primary fact of the justices and the only reasonable conclusion, even leaving out of account the husband's adultery, was that the wife was entitled to treat herself as expelled.

I confess that I found the argument attractive, but in the end I feel that it would be unsafe to accede to it. I think that it is only a court seeing and hearing the witnesses which can evaluate properly, first, what happened at Blackpool—whether the wife was (what is the essence of condonation) really agreeing to forego her remedies against her husband for the way he had treated her—and, secondly, what happened on 23rd April. Owing to the preliminary defect in procedure, neither of those matters was sufficiently investigated; and I think that it would be unsafe for us, merely reading the evidence, to come to a conclusion on them. I would, therefore, allow the appeal to the extent of remitting the case for a re-hearing.

BRANDON, J.: I agree. In *Duffield v. Duffield* (1), which was referred to by SIR JOCELYN SIMON, P., ORMEROD, J., said:

"In conclusion, it cannot be emphasised too strongly that in cases where adultery is alleged, whatever the circumstances in which it is alleged, full particulars must be given. Otherwise, the wife is faced with the burden of attempting to answer a charge which is extremely serious and may have implications of all kinds without having any idea of the nature of the allegations made against her."

Except that in this case we are dealing with a husband charged with adultery, it seems to me that those words apply exactly to this case. It was said by counsel for the wife that the husband was not prejudiced by the absence of particulars, because he knew that he had committed the adultery to be charged and admitted it on oath at the hearing. I do not think that that shows that he was not prejudiced. The issue which arose in relation to that adultery was not whether it had been committed or not, but whether it had been condoned or not, and it is in relation to that issue that he was taken by surprise. He was ready to meet the case of adultery against him by saying that the wife knew about it in 1967. But at the hearing he was taken by surprise by a case made by the wife that she only knew about it on 11th April 1968. As I understand the course of the proceedings, neither he nor his advocate ever really recovered from the surprise involved in that case.

It seems to me that, if proper particulars of the charge had been given, they would not only have stated that adultery would be alleged with either a named or unknown woman in 1966, but further—because otherwise the wife's case would not have come within the relevant period of time—that the wife first knew of such adultery on 11th April 1968. Had the husband had notice that that was the nature of the wife's case, then his case on condonation could have been properly investigated, prepared and presented. As it was, the vital question as to what was the nature of the stay together over Easter 1968—whether there was sexual intercourse or not and whether, in having sexual intercourse, if she did, the wife intended to reinstate the husband in respect of all past misbehaviour—was never properly gone into.

(1) 113 J.P. 308; [1949] 1 All E.R. 1105.

We seem to have a rather curious position in the law now as a result of statutory amendment that condoned adultery is incapable of revival, but condoned improper association short of adultery is capable of revival. I can visualise cases, and this may be one of them, where that anomaly, if it does indeed exist, may give rise to great difficulties in adjudication. It seems to me in this case that, if the wife's charge of constructive desertion was to be investigated properly, it was necessary for the court to make findings with regard to the nature and extent of the reinstatement, if any, arising from the living together at Blackpool at Easter 1968; and, having made those findings, to go on and make further findings about the further conduct relied on by the wife as justifying her in leaving, as viewed against the background of the earlier conduct. In considering whether a last straw is sufficient to break a camel's back, it is necessary to weigh both the last straw and the pre-existing burden, and, in weighing the latter, to see whether and to what extent, as a result of reinstatement, the burden was, at any rate for the time being, lightened or removed.

For these reasons, I agree with SIR JOCELYN SIMON, P., that two important questions of fact have never been properly investigated in this case, and that without such investigation the trial cannot be regarded as satisfactory. It seems to me that counsel for the wife has not made good his argument that, although there was a fundamental fault in the procedure in this case, it did not lead, or may not have led, to injustice. It may well be that, when the matter is re-heard, it will not produce any other result. That will be entirely a matter for the court of re-hearing. But I do not think that, where there has been a real fault in procedure of the kind that there has been here, and there is a real risk that it may have caused injustice, we can allow the result to stand. I agree, therefore, that there must be a re-hearing.

SIR JOCELYN SIMON, P.: I would expressly add my concurrence with what BRANDON, J., said as to the further matter that should be a matter of notice to the other side, namely, where a charge of adultery, however raised, does not apparently fall within the period specified by s. 104 of the Act of 1952 (cf. s. 12 (1) of the Act of 1960). When that state of affairs occurs, I agree with BRANDON, J., that the other side should be alerted to the matter relied on as bringing the act of adultery alleged within the period specified by the statute.

Appeal allowed in part.

Solicitors: *Russell & Russell*, Bolton; *James Corrigan*, Bolton.

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WINN AND WIDGERY, L.JJ., AND LYELL, J.)

February 12, 1969

R. v. SUTTON

Criminal Law—Abandonment of appeal—Application to withdraw notice of abandonment—When court will entertain application—Criminal Appeal Rules 1968 (S.I. 1968, No. 1262), r. 10.

The Court of Appeal (Criminal Division) will not entertain an application to withdraw notice of abandonment of an appeal unless it is apparent on the face of the application that some ground exists for supposing that there may have been either fraud, or at any rate bad advice given by a legal adviser, which has resulted in an unintended and ill-considered decision to abandon the appeal.

APPLICATION by Philip Sutton for leave to withdraw a notice of abandonment of his appeal against his conviction at Somerset Sessions of officebreaking and larceny. The applicant did not appear.

WINN, L.J. delivered the judgment of the court: This is an application to withdraw a notice of abandonment. The court is receiving a great many of these applications in modern times, far too many, and it is perhaps desirable that it should be understood that the court will not entertain any such application for leave to withdraw a notice of abandonment unless it is shown affirmatively that something amounting to a mistake or to fraud can be shown, with a solid foundation for the allegation. That was said so long ago as *R. v. Moore* (1) in 1957. It has been said more recently by this court. It is important that this should be appreciated, since disappointments arise, tensions and misunderstandings occur, and the very valuable time of this court and of the officers of the office of this court is wasted by unfounded applications for leave to withdraw notices of abandonment. The truth of this matter, perfectly plain to the court, is that the applicant, Philip Sutton, who was sentenced to Borstal training on 12th September 1968, at Somerset Sessions, is completely dominated by his mother, and that his mother takes over, so far as she is able to, complete control of his life and his affairs. It is perfectly plain that it is she who has sought to maintain that there was no intentional abandonment of the applicant's appeal against sentence.

The matter has been investigated at considerable trouble, and the court has before it a report from the governor of the prison in Bristol where the applicant was at the material time detained. The most significant piece of evidence provided by that inquiry is that the applicant's prison number being 351550, an application was recorded in writing in the wing where he was detained under number 351550, name Sutton, that that prisoner wished to abandon his appeal to the Criminal Division of the Court of Appeal. As a result his application was referred to the legal aid department, and the court has statements which have been obtained which show perfectly plainly that, as the principal officer has himself recorded in his application book on 16th December 1968, he heard an application from the applicant to abandon his appeal and he indicates that the applicant actually asked to be allowed to abandon his appeal. That same day the applicant saw a senior officer called Weeks who is in charge of the legal aid office, and he signed Form 14, specified in r. 10 of the Criminal Appeal Rules, 1968, abandoning his appeal; the officer is perfectly certain that the applicant knew what he was doing when he was signing this form, and knew that this amounted to an abandonment of his appeal. There really can be no mistake in their minds since it is apparent that the applicant is exceptionally tall and a fair-haired youth with a great deal to say for himself; those in the prison had occasion to know him well. The suggestion is made by the governor—and this unlike the other statements I have made is only surmise—that the applicant was very anxious to be transferred away from Bristol; on several occasions he had pressed for a transfer away from Bristol, and it may well be his motive in abandoning his appeal, since he hoped to be transferred away.

The purpose of delivering a judgment at all in this case instead of simply dismissing the application is to emphasise once again that the court will not entertain these applications for leave to withdraw notices of abandonment unless it is apparent on the face of such an application that some grounds exist for supposing that there may have been either fraud, or at any rate bad advice given by some legal adviser, which has resulted in an unintended, ill-considered decision to abandon the appeal. This application is refused.

Application refused.

COURT OF APPEAL (CIVIL DIVISION)

LORD DENNING, M.R., RUSSELL AND WINN, L.JJ.

DEVOTWILL INVESTMENTS, LTD. v. MARGATE CORPORATION

November 15, 18, 20, December 11, 1968

Compulsory Purchase—Compensation—Purchase notice—Assumptions on valuation that planning permission reasonably to be expected and no part of land to be compulsorily acquired—Land Compensation Act 1961 (9 and 10 Eliz. 2 c. 33), s. 16 (2), (7).

Sub-section 16 (7) of the Land Compensation Act, 1961, a provision wholly favourable to the landowner, prevents any diminution of the value of his land being secured by a contention that planning permission would have been refused on the ground that the land was likely to be compulsorily acquired.

CASE STATED BY Lands Tribunal.

The compensating authority appealed against a decision of the tribunal awarding the claimants compensation in the sum of £13,500 in respect of the acquisition of 1.35 acres of land owned by them fronting on to Canterbury Road, Birchington-on-Sea, Margate. Their contentions on the appeal were as follows: (i) the Lands Tribunal in arriving at a valuation of the claimants' interest failed to take account in determining whether planning permission was likely to be granted or failed to take proper account of the provisions of s. 16 of the Land Compensation Act 1961 and in particular of s. 16 (7); (ii) in construing and applying s. 16 (7) the Lands Tribunal erred in finding that on the true construction of the provision the actual facts and circumstances relating to adjoining land, not being the subject land, had to be or could be assumed to be altered for the purposes of ascertaining whether planning permission could reasonably be expected to be granted; (iii) in making such an assumption the Lands Tribunal erred in valuing the claimants' interest in that such assumption, unless authorised by the provisions of the Land Compensation Act 1961, was inconsistent with the principle that the interest must be valued *rebus sic stantibus* as at the proper date for valuation, and such assumption was not so authorised; (iv) in the alternative, whether or not under the provisions of s. 16 of the Land Compensation Act 1961 the Lands Tribunal might assume that the existing facts and circumstances were altered otherwise than as authorised by s. 16 (7) in the circumstances of the decision, such assumption would conflict with the rule that no increase in compensation might be awarded which resulted from the scheme in relation to which the acquisition was made; (v) in the further alternative there was no evidence on which the Lands Tribunal could find that an alternative by-pass was inevitable, having regard to the true meaning and construction of the expression "inevitable"; (vi) insofar as the Lands Tribunal arrived at the value of £13,500 for the claimants' interest by taking into account the possibility of an alternative by-pass removing the traffic from the vicinity of the subject land, the Lands Tribunal erred in law in making its comparisons and in arriving at the value to be awarded for the reasons advanced in grounds (i) to (v).

R. W. Bell for the compensating authority.

Douglas Frank, Q.C., and B. A. Marder for the claimants.

LORD DENNING, M.R.: At Birchington in the borough of Margate there is a very busy square called Birchington Square. Through it passes all the traffic of Canterbury Road. The congestion is so bad that the authorities have for years been trying to ease the burden. At first they thought it was best to widen and improve Canterbury Road. Now they think it best to make a by-pass

to carry the traffic round the square. The scheme is still on paper and is in its early stages. There is much to do. Inquiries will have to be held. Lands acquired. And the by-pass made.

The claimants, Devotwill Investments, Ltd., own a small piece of land which fronts on to Canterbury Road. It is only 1.35 acres. It is in part an old builder's yard and in part waste land. Years ago a town map was prepared in which this 1.35 acres was shown as allocated primarily for "residential use". The map was approved in 1958 and this land was shown as suitable for development for "residential use" in from six to 20 years. At that time the planners looked into the future as best they could. No doubt they thought that Canterbury Road could take the traffic from such a development. They did not foresee the great increase in through traffic. They did not envisage a by-pass. At any rate, there is no sign of it in the town map.

On 2nd September 1965 the claimants, the owners of the 1.35 acres, applied to the planning authorities for outline permission to develop it for residential use. On 1st October 1965 the planning authorities refused permission on these grounds:

"(a) Part of the site, the subject of this application, will be required for road-improvement works to Canterbury Road, designed to by-pass Birchington Square.

"(b) Residential development of the land would be premature until it has been possible to finalise details of the road-improvement scheme referred to in ground (a) above."

Two things can be inferred from those grounds. The *first* is that there was a scheme to make a road to by-pass Birchington Square, but the details of the scheme had not been finalised. The *second* is that part of this 1.35 acres would be required for the by-pass road and part would not.

On receiving that refusal, the claimants, on 26th November 1965 called on the compensating authority to buy these 1.35 acres. (Owners of land, who are refused permission to develop, are entitled to require the council to purchase the land: see s. 129 of the Town and Country Planning Act 1962.) On 24th February 1966 the compensating authority replied, saying:

"After consultation with the Ministry of Transport, the [compensating authority] are agreeable to purchase the land, and the district valuer has been asked to negotiate the terms of the acquisition."

It is worth noting that the compensating authority consulted with the Ministry of Transport. That shows that the scheme for the by-pass was well in hand.

The parties did not agree on a price. So the matter was referred to the Lands Tribunal. The claimants claimed £16,000 for these 1.35 acres, plus surveyors' fees and legal charges. The compensating authority suggested £8,200 was the proper figure. The tribunal awarded £13,500. The compensating authority appeal to this court. The Lands Tribunal gave its decision in writing, from which this point of law emerges: The claimants submitted that the 1.35 acres should be valued on the footing that no part of it was to be used for the by-pass; that it should be assumed that there would be a by-pass on some other line which would take the through traffic away from Canterbury Road; that the by-pass would be made *immediately*; and that the easing of traffic would be so great that permission would be given for it to be built on to full capacity, that is, for 20 houses (which is all it could physically contain), all of which would gain access by Canterbury Road.

The compensating authority submitted that it would be wrong to assume a by-pass on another line; and that the situation should be considered as it was at the time of the agreement to purchase on 24th February 1966. At that time

nine houses might be permitted immediately on the front land, but another 11 houses might be allowed on the back land in later years when suitable access became available. The tribunal accepted the submission of the owners, stating:

"I accept [counsel for the claimants'] submission that, at the date of the demand notice to treat, planning permission might reasonably have been expected for *immediate* residential development on the whole of the land."

The question comes to this: Was the tribunal right in assuming that a by-pass would be made on some other line, leaving these 1.35 acres available for *immediate* development for 20 houses? The statutory provisions may be summarised as follows: As soon as the compensating authority agreed to purchase the 1.35 acres, they were deemed to acquire that land compulsorily, just as if they had acquired it for any purpose for which they had compulsory powers: see s. 130 of the Act of 1962. The valuation had, therefore, to proceed in accordance with the assumptions contained in s. 14 to s. 16 of the Land Compensation Act 1961. It was, therefore, to be assumed (i) that planning permission would be granted for the use of the land for residential purposes: see s. 16 (2) (a); (ii) that no part of the land would be acquired by the compensating authority or by any other authority possessing compulsory purchase powers: see s. 16 (2) (b) and (7).

Those are the only two assumptions which the Act requires the tribunal to make; and I see no reason why the tribunal should make any further assumptions. In particular, I see no reason why the tribunal should assume that a by-pass would be made on this present line or on any other line. Clearly the tribunal cannot assume that a by-pass would be made on *this present line*. Section 16 (7) excludes that assumption. And the tribunal should not assume a by-pass on *some other line*; because that is contrary to all probabilities. If any scheme is adopted for a by-pass, it will very likely be the present scheme and none other.

Moreover, if one assumes that a by-pass along *some other line*—and *immediately* made, so as to be at once in use—then these 1.35 acres will gather considerable betterment from the assumed scheme. Canterbury Road will be deemed a quiet town street. The 1.35 acres will be deemed to be an attractive housing estate for 20 houses next to it. It will be considerably increased in value. The tribunal recognised this. It stated:

"The assumed corollary of a by-pass on another line might be said to be letting in some increment in the nature of betterment."

It follows that, by assuming a by-pass on another line to be *immediately* carried out, the claimants would be getting an increase in value which was due, not to the intrinsic advantages or potentialities of their own land, but to an assumed scheme of compulsory acquisition which in all probability will never be carried out. It would, I think, be contrary to the intentions of Parliament that they should be given an increment on that account. It is a general principle that

"... compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition"

see *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands* (1) and *Viscount Camrose v. Basingstoke Corpn.* (2). So also compensation cannot include an increase in value which is entirely due to an assumed scheme of compulsory acquisition which is never likely to be carried out.

The claimants, the owners of the 1.35 acres, drew attention to the fact that in 1958, when the town map was prepared, there was another empty piece of

(1) [1947] A.C. 565.

(2) [1966] 3 All E.R. 161.

land which was shown as allocated primarily for residential use. It was the other side of Birchington Square. In 1961 the owners of that piece were given outline permission for a housing estate. In 1962 they obtained approval for the details. In 1963 they built the houses and called it the Yew Tree Estate. So they did well out of their "residential" allocation. The owners of the 1.35 acres claim that they should be entitled to do the same. I do not think so. Some years have passed. The congestion is worse now than it was in 1961. Permission would not in 1966 be given for such extensive development on to Canterbury Road. And it was at 1966 that the compensation has to be decided.

Viewing the matter quite broadly, it seems to me that the claimants, the owners of this little piece of waste land (1.35 acres), are doing quite well out of the fact that it was allocated in the town map for "residential development". It means that, apart altogether from the by-pass scheme, they will get at least £8,200 for it—a sum which shows them, no doubt, a handsome profit without doing a hand's turn to develop it. I see no reason why they should get an extra £5,000 by assuming in their favour a by-pass scheme on another line. It would give them, contrary to all principle, an added profit which was entirely due to the scheme for a by-pass.

The Lands Tribunal stated that

"there was much evidence and argument addressed to the question of whether, assuming no permanent access to Canterbury Road in the position supposed by the claimants, the back land would be expected to be developed in due course in co-operation with the adjoining owners."

But it did not make any alternative award on that basis. In the circumstances I think the case should go back to it for reconsideration, for I think it was the right basis. I would allow the appeal and remit the case to the tribunal for him to reconsider his award, having regard to this judgment.

RUSSELL, L.J.: Application was made for planning permission for residential development of the site adjacent to Canterbury Road, Birchington. The land was allocated in the town map for such development and programmed for such development in a period that includes the relevant date for assessment of compensation. The compensating authority refused such permission on the grounds that—

"part of the site will be required for road improvement works to Canterbury Road, designed to by-pass Birchington Square [and] residential development of the land would be premature until it has been possible to finalise details of the road improvement scheme."

The claimants as owners served a purchase notice under s. 129 of the Town and Country Planning Act 1962, claiming that the land had been rendered incapable of reasonable beneficial use in its existing state: the compensating authority served notice that they were willing to comply with the purchase notice on 24th February 1966. On that date, accordingly, the compensating authority were deemed to be authorised to acquire the land compulsorily in accordance with Part 5 of the Act of 1962 and to have served notice to treat. As a result compensation has to be assessed and the question in this appeal is whether the Lands Tribunal has erred in assessing that compensation. Compensation was to be assessed under the Land Compensation Act 1961. The main feature of s. 5 for present purposes is that the value of land shall be taken to be the amount which that land if sold in the open market by a willing seller might be expected to realise. Section 14 to s. 16 contain assumptions as to planning permission that are to be made in the course of assessing compensation. Section 16, so far as concerns the present case, requires it to be assumed that planning

permission would be granted for any development for residential use which might (if no part of the land were proposed to be acquired by an authority having compulsory powers) reasonably have been expected to be permitted, and subject to such conditions, if any, as might reasonably be expected to be imposed. (It is not material in the present case, but I am inclined to disagree with the view expressed by the Lands Tribunal on the construction of the section that it is possible to find that no such development might reasonably have been expected to have been permitted: I would prefer the view that the function of s. 16 (2) (b) is to restrict the *carte blanche* of the rest of the subsection but never to extinguish its operation.) The Lands Tribunal as a first step in assessing compensation was therefore required to apply to the case the above assumptions, in order to determine the quality or character—in the sense of development potential—of the property which the hypothetical purchaser must evaluate.

The case has two main factors. One is that Canterbury Road carries heavy traffic, which introduces problems in access thereto from the relevant land if developed residentially, with associated sight line difficulties: though it will have been seen that this was not in terms the ground for refusal of planning permission. The other is that the compensating authority consider it urgently necessary to relieve the congestion in the relevant stretch of Canterbury Road, and the present idea is to do so by a by-pass, part of the route of which, according to some current plan, passes through and occupies a large part of the relevant land.

The development for which permission could reasonably have been expected at the relevant date, put forward by the claimants, consisted of four blocks of five, four, five and six houses with appropriate garage or parking space, and access to Canterbury Road. The compensating authority put forward, somewhat unwillingly, a development, consisting of two blocks of four and five houses respectively with temporary access to Canterbury Road, as being that for which permission could reasonably have been expected at the relevant date, together with a possible full development of the relevant land when the other land behind it became developed and road access to the relevant land would not be from Canterbury Road at all.

In both cases the proposals of what residential development might reasonably be expected to be permitted ignored the possibility that any part of the relevant land might be acquired by an authority having compulsory powers for a purpose inconsistent with full development of the land for residential purposes, whether for a burial ground or a by-pass. This was in accordance with s. 16 (7) of the Land Compensation Act 1961. The compensating authority's proposals, however, were put forward on the assumption that the traffic situation in Canterbury Road would not be relieved in any way. This was on the footing that s. 16 (7) required that the only current plan for relieving that traffic situation, the construction of a by-pass through the relevant land, must be ignored, and no other idea for such relief was in mind.

In my judgment that is the wrong approach. In my view, s. 16 (7) has the artificial strictly limited purpose and effect of preventing the compensating authority from asserting that permission for a particular development could not be reasonably expected because the land was or was likely to be required for some other purpose which if achieved was inconsistent with that development: which was indeed the ground on which planning permission was in fact refused in this case. Having had that effect the subsection is in my view spent. This leaves at large the question whether the only stumbling block in the way of a reasonable expectation of permission for full development—viz., the traffic

congestion in Canterbury Road—is likely to remain indefinitely. Here it seems to me that we move from the field of the artificial to the field of fact, where s. 16 (7) has no part.

The Lands Tribunal took the view that in the field of fact it was bound to assume that traffic in Canterbury Road would not be relieved by the by-pass as at present envisaged, but that in the light of the urgent need to reduce the traffic in Canterbury Road it must be assumed as an artificial corollary that the reduction would be achieved by a by-pass in a situation that would incorporate no part of the relevant land: and that other situation could on the ground only be such as to relieve congestion in the part of Canterbury Road in which access to the development was proposed, thus removing the only obstacle put forward by the compensating authority to a reasonable expectation of permission for full development. The Lands Tribunal relied in part for this approach on the dictum of LORD ASQUITH OF BISHOPSTONE in *East End Dwellings Co., Ltd. v. Finsbury Borough Council* (1) though I observe that that dictum related to an inevitable corollary *in law* of an imaginary state of affairs.

For my part I do not think that it was necessary for the Lands Tribunal to look for and find an alternative site for a by-pass, taking as I do a strictly limited view of the function and effect of s. 16 (7). Thus far I consider that the Lands Tribunal was well entitled, when faced with the simple alternative between a development of 20 houses, and a development of nine houses with further development postponed, to reject the postponement of 11 houses, which postponement was based on an assumption of no relief to the traffic situation in Canterbury Road. If I were wrong in my strictly limited view of the function and effect of s. 16 (7), I would however agree with the view of the Lands Tribunal that the state of affairs to be assumed by that subsection should lead to the further assumption that the urgent traffic problem will lead to a by-pass which will pass to the south of the relevant land.

That concludes the exercise in the first stage of assessing compensation: that which I have described as the determination of the quality or character—in the sense of development potential—of the property which the hypothetical purchaser must evaluate. The second stage is a pure exercise in valuation of the property of that quality or character, on which I have nothing to say.

Somewhat late in the hearing, counsel for the compensating authority raised the argument that the decision infringed the principle of *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands* (2), which can scarcely have been raised below since no mention is made of that case. As I understand the argument it is said that the land is being acquired as part of a scheme for the construction of a by-pass, that the decision of the Lands Tribunal involves including in the assessment of compensation an increase in value of the relevant land attributable to the scheme, and that such inclusion is contrary to well-established principle. With all respect to the contrary view I am unable to accept that proposition. In the first place I think that the facts as set out in the Case Stated are all too slight to enable this court to find that there was anything that could at the date of the assumed notice to treat be dignified by the title of scheme. Maybe this is because this case was not put forward by the compensating authority before the Lands Tribunal. In the second place in my view the principle has no application to the first operation to be performed, viz., under s. 16, the ascertainment of what residential development permission might reasonably have been expected. If there had been a recognisable scheme,

(1) 115 J.P. 477; [1951] 2 All E.R. 587; [1952] A.C. 109.

(2) [1947] A.C. 565.

and had at the pure valuation stage evidence been led to show that the purchasers of the houses when built would be probably prepared to pay £100 more per house for fronting on or access to a relieved rather than a traffic-congested road, the point might well have been of substance. This may I think be the explanation of the reference in the decision of the Lands Tribunal to "some increment in the nature of betterment". But that is not the proposition argued before us. For these reasons I would dismiss the appeal.

WINN, L.J.: The main contention raised by the compensating authority is that in valuing land taken by them from the claimants the Lands Tribunal erred in law by failing to take proper account of the provisions of s. 16 (7) of the Land Compensation Act 1961. The land in question consisted of a small area of 1.35 acres fronting Canterbury Road, Birchington. This county road A.28 carries heavy traffic, including some from London bound for Margate: it runs south-west to north-east through Birchington Square near the centre of the town and through the busiest shopping area.

The borough engineer gave evidence before the tribunal that improvement of the traffic flow had long been under consideration and that it was now hoped to construct a by-pass in 1970; a line for the road had been decided, departing from Canterbury Road where the relevant land adjoined it and running across that land, although not absorbing all of it. This proposed road has not yet been approved by the Minister of Transport nor was there any indication of it on the Thanet town map of 1958, which had not been amended. On that map the relevant land was allocated primarily for residential use: the programme map indicated that development of it was contemplated in the period six to 20 years after 1958.

In September 1965 the claimants applied for permission for such development; this was refused by notice dated 1st October 1965 on the ground, *inter alia*, that—

"part of the site will be required for road improvement works to Canterbury Road, designed to by-pass Birchington Square."

They thereupon served a purchase notice which the compensating authority accepted; there was therefore a deemed notice to treat of date 24th February 1966. Earlier refusals dated respectively 21st January 1963, 30th April 1963 and 13th August 1965 referred somewhat vaguely to a "scheme to widen and improve this part of Canterbury Road" and to "road improvement works to Canterbury Road, namely the by-pass of Birchington Square".

There was no evidence that any other land had been acquired on the proposed route of the contemplated by-pass or that any compulsory purchase order had been made or any resolution passed or proposed to lead to any such acquisition. It is of course clear that the relevant land is to be regarded as having been compulsorily acquired and the motive, and, it is probably right to say, the purpose of the compensating authority in accepting the claimants' notice to purchase is indicated with adequate certainty by the terms of the refusal of permission dated 1st October 1965. This acquisition, in isolation, falls far short of establishing the existence of an adopted and existing scheme, as distinct from an intention or contemplation in the minds of some, but not necessarily all the members of the compensating authority and their advisers: what was shown by the evidence was that, so soon as the necessary approvals and financial resources had been obtained, the compensating authority would in all probability proceed in 1970 or thereafter to initiate compulsory purchase procedure to enable a by-pass to be built over lands to the north-east of the relevant land and across that land.



This situation bore only remote resemblance to that which fell to be considered by the Privy Council in the well-known case of *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands* (1). There the Crown had compulsorily acquired lands in Trinidad required by the United States of America in connection with the establishment of a naval base in the island. The construction of the base would create additional demand for the limestone which the claimants had quarried in part of the land acquired. One of the grounds on which it was held that no head of claim related to this extra demand could in law be upheld was that compensation cannot include any increase in value which is entirely due to the scheme underlying the acquisition. Approval was given to a passage in the judgment of EVE, J., in *Re South Eastern Ry. Co. and London County Council's Contract, South Eastern Ry. Co. v. London County Council* (2), in which he said:

"... increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded."

However, the facts of the case in and for the purposes of which EVE, J., stated that proposition were very special inasmuch as the owner of the land taken, which abutted on the West Strand, in London, was also owner of contiguous land, not acquired, fronting on Craven Street; it was unsuccessfully argued for London County Council that regard should be had to the fact that the contemplated widening of the Strand would increase the value of the Craven Street plot. Accordingly the dictum of EVE, J., had no relevance. In the Court of Appeal it was emphasised that the relevant Act contained no provision for off-setting betterment.

There is further authority, were it needed, in *Fraser v. Fraserville City* (3) for the general proposition, which I would regard as a common law principle, stated in that case in the words:

"... the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case."

I pause to comment that those last words seem important in the present case: in the *Fraser* case (3) it was manifest that the scheme was to acquire land to construct reservoirs in order to supply a hydro-electric power station and the arbitrator had erred by including the value of the power which would thus be generated. There was an equally definite scheme in *Viscount Camrose v. Basingstoke Corpn.* (4).

It must be borne in mind that as a matter of logic there is no room in the circumstances of the instant case for any application of the *Pointe Gourde* (1) principle because there has been no suggestion, or if there has been it has escaped me, of any respect in which any use of adjoining lands to the north-east of the relevant land could increase the value of the relevant land when itself used as a road. The issue is, on a proper analysis, not one of value, but, treating it for the moment and for convenience of the argument as though it had been, it is a manifest absurdity to suppose that by turning the whole or the greater part of

(1) [1947] A.C. 565.

(2) 79 J.P. 545; [1915] 2 Ch. 252.

(3) [1917] A.C. 187.

(4) [1966] 3 All E.R. 161.

1½ acres allocated for residential user into a road a scheme so to use it and adjoining lands in different ownership could give any increased value to the relevant land.

To what extent, if at all, the *Pointe Gourde* (1) principle co-exists with the express statutory provisions found in s. 6 of the Land Compensation Act 1961 it is accordingly unnecessary to decide. As at present advised I incline to the view that these provisions must so prevail as to leave no room for the application of any wider doctrine. Without attempting to emulate the gallantry with which counsel for the compensating authority strove to interpret the lamentable language of this section before finally abandoning any reliance on it, I am content to hazard the view that it cannot apply to any case where the value of the relevant land is said to be affected by development on other land unless that other land forms, together with the relevant land, part of an aggregate authorised to be acquired by the same compulsory purchase order or special enactment. Such is not the present case: ground 4 of the appeal is not made good.

As already recognised, the issue to which consideration of the prospects of the future construction of any by-pass across the relevant land, or elsewhere, is relevant is not one of value but of probability with respect to the obtaining of planning permission for residential development of the relevant land. The Act of 1961 requires certain assumptions to be made by any tribunal concerned to assess that probability, but ultimately the issue is one of fact to be determined by the application of expert knowledge and experience aided normally, as in this case, by a personal inspection of the relevant site and neighbourhood.

Section 16 (7) of the Act of 1961, which the compensating authority maintained, for reasons which were neither wholly clear nor convincing, had not been properly applied by the Lands Tribunal, is a provision wholly favourable to the landowner: it simply protects him against any diminution of the value of his land being secured by a contention that planning permission would have been refused on the ground that his land was likely to be compulsorily acquired.

For the purposes of the instant case the important statutory assumptions are those enacted in s. 16 (2) (a) and (b), and (6) (a). The last provision reduces, of course, the strength of the favourable wind with which s. 16 (2) (a) and (b) fill the sails of a claimant. Taking all these provisions, including s. 16 (7), together, they constitute the terms of reference or instructions for the Lands Tribunal member, or other arbitrator: he is to use his skill and knowledge, the evidence and his own eyes, to assess with the aid of the sections what residential, or *mutatis mutandis* other, development would have been permitted on the relevant land by a permission issued on 24th February 1966, directing himself to assume that some such development would have been so permitted.

It is manifest from the Case Stated that this is precisely the exercise performed by J. S. DANIEL, Esq., Q.C., the member of the Lands Tribunal. Whether or not his conclusion and the consequential valuation represented a correct exercise of expertise is not a matter for this court, provided, as I think is the case, that no error of law is shown to have vitiated his reasoning. Without purporting to review the whole of his reasoning I think it is clear that the tribunal member properly had regard to the established need for residential development in Thanet and may well have taken into account the pressure which any such development would exert on available financial and other resources of the compensating authority. He had evidence that an estate, called Yew Tree Estate, of some 60 dwellings had been granted in 1961 detailed approval including access to Canterbury Road. It was amply proved that already in 1966 traffic conditions

(1) [1947] A.C. 565.



would necessitate the provision of a by-pass within the foreseeable future: the layout of Birchington would preclude any junction of this future road and Canterbury Road at any point north of the relevant land: a by-pass from any point south of the relevant land would greatly lessen the traffic passing that land.

There was no contemplation of any other line for such a by-pass than one leaving Canterbury Road across the relevant land, but it would not be impossible to construct one from a more southerly point. In fact, therefore, the probabilities were that the compensating authority would decide to make a road across the relevant land, if they could, rather than elsewhere, but this they could do only by somehow acquiring it. The compensating authority as the county roads authority possessed compulsory purchase powers (cf., the Highways Act 1959, s. 214 (2)) and, of course, had such powers for other purposes such as the provision of schools or cemeteries; they were in reality acquiring the relevant land yet the tribunal was required when assessing the probable permission to ignore this fact, and to treat it as non-existent, by force of s. 16 (7) of the Act of 1961. The effect of this subsection was that the planning permission "which... might reasonably have been expected to be granted" had to be assumed to be the same as that reasonably to have been expected had there been no actual or anticipated acquisition of the relevant land by the compensating authority (or any other "authority possessing compulsory purchase powers").

This being the highly artificial, notional and unreal situation in which the tribunal member was bound to visualise an application for planning permission, as it were to develop an estate in cloud cuckoo land, the assumption and corollaries on which he built the foundations of his valuation do not reveal any error of law. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *T. F. Sidnell*, Town Clerk, Margate;
Girling, Wilson & Harvie, Margate.

F.G.

COURT OF APPEAL (CRIMINAL DIVISION)

(WINN AND WIDGERY, L.JJ., AND LAWTON, J.)

February 13, 1969

R. v. WEEKES

Criminal Law—Sentence—Borstal training—Leave to appeal granted—Reports to be before Court of Appeal.

Where leave to appeal against a sentence of Borstal training has been granted, it is important that there should be before the Court of Appeal for their assistance not only the most up-to-date probation report, but also reports from the head master and housemaster of the Borstal institution where the appellant has been detained in the interim.

APPEAL against sentence.

The appellant, Ricardo Denroy Weekes, aged 19, was convicted at Ealing Magistrates' Court of receiving a motor scooter knowing it to have been stolen, and was committed for sentence to Greater London (Middlesex Area) Sessions, where, after his appeal against conviction had been dismissed, the chairman sentenced him to a period of Borstal training.

John A. Baker for the appellant.

WINN, L.J., in giving the judgment of the court, after stating the nature of the appeal, continued: It is important that note should be taken of the practice direction which this court is about to give. In such a case where a young accused has gone to Borstal under a sentence against which leave to appeal is granted, not only the most up-to-date possible probation report is required for the assistance of this court, but it is of great importance that a report should be obtained from the headmaster or the housemaster of the borstal where he has been detained in the interim. This court has no such assistance and has derived no help whatsoever from the transcript of the proceedings on the appeal which the learned single judge directed should be obtained. The only result of that direction has been that the appellant has been in Borstal or at Wormwood Scrubs since September 1968, whereas now the court is about to put him on probation. [HIS LORDSHIP, after considering a probation report, said the court would substitute a probation order for three years.]

Sentence varied.

Solicitor: *Registrar of Criminal Appeals.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WIDGERY, L.J. AND LAWTON, J.)

February 17, 1969

R. v. WALL

Road Traffic—Driving with blood-alcohol concentration exceeding prescribed limit—Breath test—Arrest—Impairment reasonably expected—Duty of arresting officer—Road Traffic Act, 1960 (8 & 9 Eliz. 2 c. 16), s. 6 (4)—Road Safety Act, 1967 (c. 30), s. 2 (1).

Where a breath test has been demanded and an arrest follows, and the arresting officer reasonably suspects the arrested person not only of an offence under the Road Safety Act, 1967, but also of impairment of driving ability, the proper course is for him on arrest to make it clear to the arrested person that he is being arrested not only as the result of a breath test under s. 2 of the Act of 1967, but also under s. 6 (4) of the Road Traffic Act, 1960.

APPEAL by Harry Wall against his conviction at Lancashire County Quarter Sessions of driving a motor vehicle with a blood-alcohol content above the prescribed limit, when he was fined £10 and disqualified for holding a driving licence for 12 months.

A. C. Jolly for the appellant.

P. J. Hunt for the Crown.

LORD PARKER, C.J., having stated that the facts were indistinguishable from those in *Campbell v. Tormey* (1), continued: In *Campbell v. Tormey* (1), in adding a few words to the judgment of ASHWORTH, J., I think, on re-reading the matter, that I went too far, insofar as I suggested that it was the duty of a police officer in every case to tell an accused whether he was being arrested under s. 2 of the Act of 1967 or under s. 6 of the Act of 1960, and that whether the accused asked or not. As it seems to this court, it would be putting an undue burden on the police to have to specify the position in every case. Where, however, a breath test is demanded and an arrest follows, then, as in the present

(1) Ante p. 267.

case, the court is satisfied that *prima facie* there was an arrest under s. 2. Where, however, impairment is reasonably suspected, the proper course for the police officer on arrest is to make it clear that he is arresting not only as the result of a breath test under s. 2, but is also arresting under s. 6 (4) of the Act of 1960. If that is borne in mind and carried out, then there should be no difficulties in cases such as this.

Appeal allowed. Conviction quashed.

Solicitors: *Registrar of Criminal Appeals; Gregory, Rowcliffe & Co., for Edward L. Alker & Ball, Wigan.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 5, 1968

MINISTER OF HOUSING AND LOCAL GOVERNMENT v. LAMBERT

Local Government—Officer employed in county council valuation panel—Retirement compensation—Reorganisation in London pursuant to Act of 1963—Officer made redundant at age of 60—Normal retiring age 65—Basis of compensation—Whether on actual average salary during last five years before retirement or on national average of five years between ages of 60 and 65—Local Government Superannuation Act 1937 (1 Edw. 8 & 1 Geo. 6, c. 68), s. 8 (5).—Local Government (Compensation) Regulations 1964 (S.I. 1964 No. 1953), reg. 2 (1).

The respondent had been employed in local government service from 1923 to March, 1967, and during the last 17 years had been an officer of a county council valuation panel. As a result of reorganisation in the London area pursuant to the London Government Act, 1963, he was made redundant on Mar. 31, 1967, when he had attained the age of 60. He had by then become entitled to the maximum salary. If he had not been redundant as heretofore stated, his normal retiring age would have been 65. He had become entitled, *inter alia*, to retirement compensation under Part 5 of the Local Government (Compensation) Regulations, 1964. By reg. 20 (1) (a), as a pensionable officer, his retirement pension was to be "an annual sum equal to the amount of his accrued pension". By reg. 2 (1) "accrued pension" meant "the pension to which he would have become entitled" if at the date on which he ceased to be subject [to the scheme] he had attained normal retiring age. The pension scheme was subject to the Local Government (Superannuation) Act, 1937, s. 8 (5). Under that subsection the respondent's pension was to be calculated on "the annual average of the remuneration received by him in respect of service rendered during the five years immediately preceding the day" of his retirement. The Industrial Tribunal awarded him a retirement pension based on the average salary he would have received for the 5 years preceding the date when he would become 65. On appeal by the Minister of Housing and Local Government,

HELD: the decision of the tribunal was wrong because on the construction of reg. 2 (1), so far as the quantum of payment was concerned, that had to be based on actual facts and actual payments, although it was only a notional figure by reason of the fact that it had to be assumed that the respondent had attained the age of 65; no assumption was to be made that the average was to be calculated on the basis that the respondent had for the preceding five years reached the salary that he would have earned if he had continued to work till he was 65.

APPEAL by the Minister of Housing and Local Government against that part of a decision of the Industrial Tribunal which related to proceedings under the London Government Act, 1963, and the London Government (Compensation) Regulations, 1964, between the respondent, Albert Edward Lambert, and the appellant whereby it was decided that the respondent's retirement compensation under the

regulations should be calculated on the assumption that, at 31st March, 1967, he was 65 years of age and had been in receipt of the full salary at the head of the scale for more than five years, thus giving him a retirement compensation of £272 16s. 1d. The Minister contended that the retirement compensation should be calculated on the basis of the average remuneration actually received by the respondent during the five years preceding 31st March, 1967, the date on which he actually ceased to be employed, and that his retirement compensation should be £170 14s. 10d.

Gordon Slynn for the appellant.

The respondent appeared in person.

LORD PARKER, C.J.: This is an appeal from a decision of the Industrial Tribunal given on 2nd February, 1968 in regard to the calculation of compensation to which the respondent became entitled as the result of reorganisation which occurred under the London Government Act, 1963. In fact, three matters arising in regard to this were dealt with by the tribunal; in two cases they found against the respondent, and in one case for him. In the case where the respondent succeeded, the Minister now appeals, saying that the tribunal came to a wrong conclusion. It is that point, and that point only, which comes before this court.

Before looking at the statutes and regulations, it is convenient to set out the short facts. Ever since 1923 until 1967 the respondent has been employed in local government work. From 1923 to 1950 he was employed by the Tottenham Borough Council, ending up by being the principal valuation officer of the local valuation committee. Then, by the Local Government Act, 1948, the jurisdiction of the local valuation committee was transferred for the most part to the Inland Revenue, but to a smaller degree to new valuation panels which were to be set up. The respondent did not want to go to the Revenue; he looked round and finally got a job in 1950 with the West Kent Valuation Panel under the Kent County Council, and from 1950 to 1967, that is to say for 17 years, he was so employed. In 1967, pursuant to the London Government Act, 1963, there was a drastic reduction in the number of these valuation panels, and a number of valuation officers were made redundant. Unfortunately for the respondent, he was just 60, and for good reasons or bad it was decided as a matter of policy that the younger men should be kept on, so that he, by reason of his age, was made redundant on 31st March, 1967, and his employment with the West Kent Valuation Panel came to an end.

Nothing really compensates a man who has lost his job at 60 in those circumstances; but happily he did become entitled to some sums of money by way of compensation. He was, of course, entitled to a redundancy payment under the Redundancy Payments Act, 1965, which amounted to £1,020. He also became entitled under the contributory pension scheme to a sum of £1,365 odd. In addition, he became entitled to compensation under the London Government (Compensation) Regulations, 1964. In the first place, he became entitled, by what was called a long-term compensation, to a sum payable until his retirement pension begins. That was assessed first at a yearly sum, and then compounded as a capital figure at some £74, and again no dispute arises as to that. But finally he became entitled under Part 5 of the regulations of 1964, to a retirement pension. It is with the calculation of that retirement pension that this appeal is concerned.

By reg. 20 (1) of the regulations, it is provided that:

"Subject to the provision of these regulations when a pensionable officer to whom this Part of these regulations applies reaches normal retiring age the

retirement pension payable to him for loss of emoluments shall be (a) an annual sum equal to the amount of his accrued pension . . ."

Pausing there, there is no doubt that the respondent was a pensionable officer to whom this Part of the regulations applied. It is also agreed that his normal retiring age was 65, and the sole question is how the amount of that accrued pension is to be calculated. Under the pension scheme to which the respondent was subject, which is indeed the statutory scheme set out in s. 8 of the Local Government Superannuation Act, 1937, his pension rights fell to be calculated by sub-s. (5) which provides:

"For the purposes of this section, the average remuneration of a contributory employee means the annual average of the remuneration received by him in respect of service rendered during the five years immediately preceding the day on which he ceases to hold his employment . . ."

For the purposes of computing the amount of pensionable rights the average figure so arrived at is multiplied by a fraction of sixtieths for each completed year of his service, in other words, if his service was 40 years, he would be entitled to 40/60ths of the average on reaching 65. "Accrued pension" for the purposes of reg. 20 is defined in reg. 2 (1) of these regulations. I will read it through as a whole first:

"... 'accrued pension' in relation to a pensionable officer who has suffered loss of employment means the pension to which he would have become entitled in respect of his pensionable service according to the method of calculation [and so on described by the pension scheme to which he was last subject for suffering loss of employment] . . . if at the date on which he ceased to be subject thereto he had attained normal retiring age and complied with any requirement of the scheme as to a minimum period of qualifying service or contribution and completed any additional contributory payment or payments in respect of added years which he was in the course of making . . ."

There is no doubt that, as the tribunal said, this is arriving at a notional accrued pension, because it says:

"... means the pension to which he would have become entitled . . . if at the date on which he ceased to be subject [to the scheme] he had attained normal retiring age . . ."

Indeed, no pension rights could accrue until he was 65. Therefore, for the purposes of reg. 20, it was necessary to bring forward the date when he reached 65. Quite clearly the words "would have become entitled" were necessary in those circumstances, but the question is whether not only is one to assume that he was 65 at that date, which in this case was 31st March, 1967, but whether one is then to consider what the five year average would be for the years 60 to 65. The importance of that in the present case arises in this way. The respondent had reached the maximum salary at some date before, 31st March, 1967. When one is taking the actual average for the five years before that date, then the average will be less than the maximum because there will be some years when he had not reached the maximum; but if one is calculating the average which he would have made during the years between the age of 60 and the age of 65, then, as he had already reached the maximum, it is quite clear that the average of those years is the maximum, and, accordingly, the figures work out in this way. If the Minister is right and one takes the actual average for five years up to 1967, the average is some £2,048, whereas if the respondent is right and one takes

the average that would have been received by him between 60 and 65, the average is £2,185. The resulting figures by way of retirement pension are in the one case £170 14s. 10d., and in the other £272 16s. 1d.

This is a hard case as it seems to me because, but for the cessation of employment in March, 1967, the respondent would have, health permitting, gone on until 65 and have become entitled to 45/60ths of the average of those five years which would be the maximum figure. That was bound to happen because he had already reached the maximum by 1967. But, as is often said, hard cases make bad law, and, whilst sympathising with the respondent, I have come to the conclusion that the tribunal were wrong. I have come to that conclusion for this reason. It seems to me that the only assumptions which one has to make in regard to accrued pension in reg. 2 (1) is, first, an assumption that, at the date of ceasing work, he had attained normal retiring age, and, secondly and thirdly, that he had complied with the requirements and completed the contributory payments there referred to. There is nothing to my mind to suggest as a matter of pure construction of this provision that one is to assume not only that the normal age of retiring has been reached, but that the average is to be calculated on the basis that he had for the preceding five years reached the salary that he would have earned if he had gone on to 65.

I said that there is no doubt about what the respondent's future earnings would have been, but that will not always be the case. Take a man who may not have reached his maximum when he ceased employment, then, if the tribunal are right, they would have in some way to assess what the average earnings would be if he had by then completed the next five years during which he has never been called on to work. They would have to assess the probabilities of his ever reaching the maximum, or if he is to reach the maximum, in which year, and arrive at what as it seems to me is a purely speculative average. It seems to me quite clear as a matter of construction that, so far as the quantum of the pension is concerned, this is to be based on actual facts, actual payments, but it is only a notional figure by reason of the fact that one is to assume that he has reached 65.

Counsel for the appellant has referred the court to another regulation, reg. 23, which, as he submits and I am inclined to agree, really puts the matter beyond doubt. This is a regulation dealing not with the assessment of the quantum as far as concerns average, but dealing with the multiplier which one applies to that average, in other words, how many sixtieths; and it is interesting to observe that it has been thought right to add a certain number of years' service, and, therefore, an added number of sixtieths in the case of these men whose employment has ceased so that they get a larger multiplier. I have already said that the respondent's service when he was dismissed was 40 years, in other words, he would be entitled to 40/60ths. By reason of reg. 23, however, he becomes entitled to another 5/60ths, hence the figure which has been applied of 45/60ths. The importance of that, as it seems to me, is this, that, if the effect of reg. 2 (1) and the interpretation of "accrued pension" is as the tribunal have held, namely, that he falls to be treated for all purposes as having reached 65 at the date in March 1967, then it would have been quite unnecessary to have reg. 23 to provide in respect of the multiplier for an added number of years.

I have come to the conclusion that the tribunal were wrong. It may be that, to some extent, they were misled by what appears to have been a misunderstanding. In the decision there is a paragraph which states:

"But we are told that under the pension scheme applicable to him (which has not been produced to us, but the allegation has not been contested by [the appellant]) that if he had been 65 years of age on 31st March, 1967,

then only the salary which he was then receiving would have been taken into account for the calculation of his pension, and his pensionable emoluments would not have been averaged over the last five years."

If that was a true statement of the position, then, so far as the respondent was concerned, since he was earning the maximum in the last year, he would be entitled to the larger figure. It is quite clear, however, that that arose as a result of a misunderstanding, and that the only scheme applicable is that in s. 8 of the Local Government Superannuation Act, 1937, and under that the figure is always calculated on a five year average. That, as I say, may have contributed to what I think was a wrong decision of the tribunal, albeit in the last paragraph they quite clearly are dealing with the matter as a matter of averages. In my judgment, this appeal must be allowed.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Housing and Local Government.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WIDGERY, L.J., AND LAWTON, J.)

February 18, 1969

R. v. McNANEY

Criminal Law—Sentence—Detention in hospital—Selection of hospital—Matter for Home Secretary—Mental Health Act 1959 (7 & 8 Eliz. 2 c. 72), s. 65.

The considerations which determine in which hospital a convicted person shall be detained under the Mental Health Act, 1959, are matters for the Secretary of State and it is not for the court to interfere. The primary function of the Criminal Division of the Court of Appeal, when an appellant appeals against a restriction order made pursuant to s. 65 of the Act of 1959, is to consider whether the original order was properly made.

APPLICATION for leave to appeal by Peter James McNaney, who pleaded guilty at Leeds Assizes to three counts of wounding with intent to do grievous bodily harm, and was ordered by HINCHCLIFFE, J., to be detained in Rampton Hospital under s. 60 of the Mental Health Act, 1959, the judge also ordering under s. 65 of that Act that a restriction order should be imposed without limit of time. The applicant applied for leave to appeal against the imposition of the order.

Niall MacDermot, Q.C., and J. B. M. Milmo for the applicant.

The Crown were not represented.

WIDGERY, L.J., delivered this judgment of the court: The applicant pleaded guilty at Leeds Assizes as long ago as October 1967 to three counts of wounding with intent, and he was ordered to be detained in Rampton Hospital under s. 60 of the Mental Health Act 1959, with a restriction on his discharge under s. 65 without limit of time. He now seeks leave to appeal against that order, after refusal by the single judge, and in his own grounds of appeal he describes the restriction order as being unjust, which indicates that at that stage he did not appreciate its significance, although no doubt he has now received advice from his advisers on it.

The three offences all took place on 8th or 9th July 1967 in Hull, the applicant being on his travels at that time, being in Hull, and attacking three individuals in each case with his walking stick. The first victim was a man of 59; he was not badly injured and did not have to go to hospital. The second was a man of 71, who was set on by the applicant with his walking stick after a conversation at a bus stop, and this man sustained a one inch laceration in his head which required stitching; then finally a widow of 72 was attacked by the applicant with the same weapon and again sustained a laceration which required stitching. He is 38 at the present time and has a long history of mental weakness. There were before the court below two reports, as required under the Mental Health Act 1959, by qualified medical officers, the first one, by Dr. Orr, goes in detail through the applicant's medical background. Apparently when he was nine years of age he was certified as a feeble-minded person; he then went to a hospital in Leeds called Meanwood Park Hospital, which specialised in this kind of patient. He had a number of periods on licence, but remained otherwise at Meanwood Park until he was 28 years of age. Then he was discharged, and he had one or two sentences of imprisonment for matters which are not directly relevant to this appeal, and it was at this time that he started to make threats against his wife and said he was going to kill her. As a result he was re-admitted to Meanwood Park Hospital as an informal patient on the same day as he was discharged from prison, 12th November 1965. He stayed in Meanwood Park for a while, and then was admitted to St. James's Hospital in Portsmouth, having misbehaved himself in Portsmouth by pulling telephone handsets out of kiosks, as a result of which he went back to Meanwood Park yet again on 21st June 1966, and was discharged in the autumn of 1966. Thereafter he worked for a time in an iron works as a labourer doing heavy work, but he had the misfortune to have an accident due to the negligence of one of his fellow workers. That terminated his employment, and then he went on his travels, as it was put, wandering about the country for a period, during which he committed these offences in Hull.

Dr. Orr's report, having dealt with all these matters, describes how, while under observation, the applicant had written threatening letters to his former landlord and his former landlord's wife. Then Dr. Orr expressed this extremely important opinion. He states:

"In my opinion his threats of violence are not the idle posturing of a person of sub-normal intelligence and hysterical personality who is attempting to manipulate his environment or to attract attention to himself. In my opinion he is suffering from Subnormality within the meaning of the Mental Health Act 1959, he is a danger to those around him, and he is in need of supervision, treatment and training of a type that can only be provided with in Special Hospital".

The confirmatory report by Dr. Harvey goes into less details, but is broadly speaking in step with the report of Dr. Orr.

It seems to this court that on the material facing the learned judge at Leeds Assizes in October 1967, the only possible order was the one which he made; it was clearly right to regard this as a case for mental treatment rather than prison, and a restriction under s. 65 was absolutely necessary in a case of this kind. Counsel for the applicant has told us today with engaging candour that he would rather be in prison than in Rampton, and if he has to be in a special hospital at all, would rather be in Moss Side than in Rampton. In support of that submission, he has given us some helpful additional information about the applicant's background, and in particular has shown us a report recently made

at Rampton by the consultant psychiatrist now responsible for the applicant's treatment. This report, and I shall not read it in full, indicates that the applicant is making progress, but it also makes it quite clear that he still requires treatment, and there is no suggestion that he has yet reached the stage in which he can be released and go back into circulation with the general public again.

In the view of this court it would be quite wrong for us to attempt to interfere as between Rampton and Moss Side. Any considerations which determine which hospital the applicant should be detained in are matters for the Secretary of State, and it is not for us to interfere. So far as the suggestion that he might serve a sentence of imprisonment is concerned, not only is there the difficulty that the applicant still seems to require medical treatment in a hospital, but the problem of what length of prison sentence would be appropriate would be an extremely hard one to solve. It would be necessary to give him a sentence of imprisonment which would keep him under restraint for as long as he continues to exhibit these times of violence, and no one really could foresee what the appropriate period would be. In any case, in the view of this court our primary function is to consider whether the order was properly made when made, and it is not really for us to review the applicant's progress 15 months later. That is a process properly assigned to the Secretary of State, and one which ought to be carried out through administrative channels. Accordingly, in our judgment this was a correct order when made. We see no reason to vary it and the application is refused.

Application refused.

Solicitors: *Clay, Allison & Clark, Retford.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., WINN, L.J., AND ASHWORTH, J.)

February 19, 1969

NATTRASS *v.* BRERETON

Weights and Measures—Prepacked goods—“Prepacked”—Made up in advance in form appropriate for retail sale—Weights & Measures Act, 1963, s. 58 (1).

By the Weights and Measures Act, 1963, s. 58 (1) “pre-packed” is defined in relation to goods offered for sale as “made up in advance ready for retail sale in or on a container”.

Those words mean “made up in advance in a form appropriate for retail sale should the goods be sold by retail”.

CASE STATED by Runcorn, Cheshire, justices.

The appellant preferred an information against the respondent alleging that the respondent had sold to the Cheshire County Council goods pre-packed in a container which was not marked with an indication of quantity by net weight, contrary to the Weights and Measures Act, 1963, Sch. 4, part VII, para. 2 (b) (ii). The justices dismissed the information, and the appellant appealed.

Eyr Lewis for the appellant.

A. L. Figgis for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county of Chester sitting at Runcorn, who dismissed an information preferred by the appellant against the respondent that the

respondent did sell to the Cheshire County Council certain goods, namely 56 lbs. of potatoes, which were pre-packed in a container, the said container not being marked with an indication of quantity by net weight of the said potatoes as required by para. 2 (b) (ii) of Part VII of sch. 4 to the Weights and Measures Act, 1963.

The respondent had a contract with the Cheshire County Council to supply vegetables to certain schools of the council. In the course of fulfilling that contract he delivered to the Halton Lodge County Primary School at Runcorn a pre-packed paper container purporting to contain 56 lbs. of potatoes. The container did in fact contain 56 lbs., but it was not marked as required by the Act with the net weight of the contents. The justices found that the respondent had himself purchased the pre-packed container from the wholesalers and had delivered it to the school in exactly the same state as he himself had received it.

It is quite clear that the justices felt, and I sympathise with them, that the provisions in regard to pre-packed containers, to which I must refer in a moment, really had no application in this case, because the contract itself specifically provided that when the goods were delivered the respondent had to weigh them in the presence of the canteen supervisor or her assistant on the school canteen platform weighing machine, and with each delivery there was to be a priced delivery note. Accordingly the magistrates clearly felt that that being provided for by the contract, there was really no need for the provisions of the Weights and Measures Act, 1963, to be fulfilled. Of course they were wrong in that. The Act is there to be obeyed if it applies in the facts of the case. They went on to find that the school was a catering establishment within the Labelling of Food Order, 1953, and that the sale to the school was not a sale by retail. The question left to be answered by the court is whether the sale by the respondent to the county council was a wholesale or a retail sale.

In my judgment—and I am not condemning the magistrates in any way—they directed their minds to entirely the wrong point, and in this they were aided and abetted by the prosecution and the defence. The question here is not whether the sale to this school was a sale by retail or otherwise. The point in this case was whether the 56 lbs. of potatoes in the container were potatoes pre-packed within the meaning of the Act. "Pre-packed" is defined in s. 58 (1), the definition section, as: "Made up in advance ready for retail sale." The offence, which is to be found in s. 22 (2) is the sale of pre-packed goods in that sense which do not comply with the conditions of the fourth schedule, and that is so whether the ultimate sale is by retail or otherwise. Schedule 4, Part VII, para. 2, provides, so far as is material:

"... potatoes . . . (b) shall be pre-packed only if—(i) they are made up in one of the following quantities by net weight, that is to say, eight ounces, twelve ounces, one pound, one and a half pounds or a multiple of one pound; and (ii) the container is marked with an indication of quantity of net weight."

Condition (i) was complied with, but under condition (ii) the container bore no such mark. The sole question here was not "What was the nature of the sale by the respondent to the county council", but whether these potatoes were pre-packed within the definition section of the Act, s. 58.

In my judgment, the words in s. 58 "pre-packed means made up in advance ready for retail sale" mean merely "made up in advance in a form appropriate for retail sale should the goods be sold by retail". The justices never applied their minds to that question with the result that the court has not been asked the proper question.

I have wondered from the beginning of this case whether the proper course would not be to send this back to the magistrates. Not having applied their minds to the proper question and not having heard any evidence concerning it, it is difficult to see what they could do at this stage, and, accordingly, I think that the better course is merely to dismiss this appeal, it being then open to the prosecution to start proceedings in a more appropriate case and with the benefit of the opinion of this court on the meaning of the words "pre-packed".

WINN, L.J.: I entirely agree and would add only one point. In my opinion the construction which my Lord has put upon the definition "pre-packed" in s. 58 is well borne out by the fact that, looking at s. 21 (2) of the Act, one finds that the phrase there used, for more general purposes of the statute, is not "made up ready for retail sale" but "pre-packed or otherwise made up in a container for sale or delivery after sale". That seems to me to stress the importance of the word "ready" and to make it clear that its true significance is that which my Lord has indicated. I agree.

ASHWORTH, J.: I also agree.

Appeal dismissed.

T.R.F.B.

HOUSE OF LORDS

(LORD GUEST, LORD PEARCE, LORD DONOVAN, LORD WILBERFORCE AND LORD PEARSON)

February 10, 11, March 26, 1969

DAWKINS (Valuation Officer) v. ASH BROTHERS & HEATON, LTD.

In estimating the notional rent of a hereditament under s. 22 (1) (b) of the Rating and Valuation Act, 1925, and thus arriving at the rateable value of the hereditament, the reasonable anticipation of the demolition of part of the hereditament within a year should be taken into account.

Decision of the Court of Appeal, 132 J.P. 49, sub nom. *Almond v. Ash Brothers & Heaton, Ltd.*, affirmed.

APPEAL by the valuation officer from an order of the Court of Appeal dismissing his appeal from a decision of the Lands Tribunal on an appeal from a decision of the Birmingham local valuation court which had reduced the assessment of the hereditament 69/71, Dartmouth Street, Birmingham 5, in respect of which the respondent, Ash Brothers & Heaton, Ltd., were the ratepayers, from a rateable value of £3,500 to £3,050. By an order dated 17th May, 1968, the name of William John Dawkins was substituted for that of K. R. Almond who died on 22nd April, 1968, and the title of the appeal was amended accordingly.

Douglas Frank, Q.C., and *W. J. Glover* for the valuation officer.

S. Brown, Q.C., and *M. K. Harrison-Hall* for the ratepayers.

Their Lordships took time for consideration.

26th March. The following opinions were delivered.

LORD GUEST: This appeal raises an important and far-reaching question on the law relating to rating. It is, shortly stated, whether the prospect of an early demolition of premises by a local authority is a relevant factor to be taken into consideration in assessing the rateable value of the property.

The ratepayers were originally owners of the whole property consisting of works and premises at Dartmouth Street, Birmingham. Early in 1946 the Birmingham Corporation, as the local planning authority, made an order for the compulsory purchase of part of the ratepayers' property. This order having been confirmed by the Minister, the corporation acquired the ratepayers' interest in that portion, which they thereupon let to the ratepayers on a yearly tenancy at a rent of £300 per annum exclusive of rates. The part of the hereditament compulsorily acquired was shown on a plan as due for redevelopment in 1965 in connection with a road widening scheme. It was reasonably anticipated that the part in question would be demolished for these purposes within about a year.

The local valuation court on 27th April 1965, on a proposal by the ratepayers reduced the assessment from £3,500 to £3,050 rateable value. An appeal by the valuation officer suggesting a figure of £3,400 as the rateable value was dismissed by the Lands Tribunal who upheld the decision of the local valuation court. The Lands Tribunal stated a case for the opinion of the court and the Court of Appeal unanimously dismissed the appeal.

It was agreed between the parties:

"Any actual tenant of the hereditament taking a tenancy thereof on the date of the [ratepayers'] proposal would have paid less rent in each year for the said hereditament if it was known or reasonably anticipated that the part [of it in question] would be demolished for road widening purposes within about a year. At the date of the said proposal it could have been reasonably anticipated that [that part] would be required for road widening purposes within about a year."

The parties were not agreed as to the type of tenancy or the term thereof on which a tenant would have taken an actual tenancy of the hereditament in the circumstances at the date of the proposal. It was agreed that, if the probability of demolition should properly be taken into account, the rateable value of the hereditament should be £3,050 but that otherwise it should be £3,400.

Section 22 (1) (b) of the Rating and Valuation Act, 1925, provides as follows:

"... there shall be estimated the rent at which the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes ... and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent, and the annual rent as so estimated shall, for the purposes of this Part of this Act, be taken to be the net annual value of the hereditament."

There is a long series of cases in which the test for assessing the rateable value of hereditaments has been considered. In *Great Eastern Ry. Co. v. Haughley* SIR ALEXANDER COCKBURN, C.J., said (1):

"But I think it is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account."

This was followed by *R. v. South Staffordshire Waterworks Co.* (2), where LORD ESHER, M.R., said:

(1) (1866), 30 J.P. 438; L.R. 1 Q.B. 666.

(2) (1885), 50 J.P. 20; 16 Q.B.D. 359.

"A tenant from year to year is not a tenant for one, two, three or four years, but he is to be considered as a tenant capable of enjoying the property for an indefinite time, having a tenancy which it is expected will continue for more than a year, but which is liable to be put an end to by notice."

In *Smith v. Birmingham (Churchwardens)* (1) WILLS, J. said:

"It is to no purpose to say that such property cannot in practice be let by the year: no more can railways, canals, docks, or gasworks. The Act of Parliament requires the assumption of a tenancy from year to year to be made, and you can no more impugn the hypothesis of such a tenancy in rating matters than in logic you are permitted to deny your opponent's hypothetical premises."

Later he said:

"It seems to me to follow that, if you are compelled to assess the occupier, whatever his actual period of past or prospective occupation, upon the assumption that there is a tenancy for a year, it is idle to talk of his being assessed at a less sum than he otherwise would be assessed at because he may in fact occupy for a week only. The hypothetical tenant and the actual tenant are two separate and distinct entities. The hypothetical tenant will give neither more nor less for his year's occupation because the actual tenant only wants to occupy for a week or a fortnight. The tenant who, ex hypothesi, is to occupy for a year cannot be put as a person who ought to pay a rent less than the fair rent for a year on the ground that there will be a week or a fortnight out of the year when the occupation will cease. That would be to contradict the hypothesis which you are bound to assume."

His decision was affirmed by the Court of Appeal, where LORD COLERIDGE, C.J., said:

"In this case we have to do what Courts have from time to time in such cases complained of having to do, viz., to apply the terms of the Parochial Assessment Act to a subject-matter to which they are not really applicable. It has been pointed out in the court below that the terms of the Act are really not applicable to a number of very valuable rateable properties, which have come into existence since the Act was passed, and which therefore were not in the contemplation of the legislature in passing it, such as railways and gasworks. In such cases the hypothesis of a tenancy from year to year is really inapplicable. How can it be supposed that anyone would become tenant from year to year of an isolated portion of a railway? What is true of great properties, such as railways, may also be true of smaller matters; and it is found that this tenement of the value of five shillings a week is not capable of being let on a tenancy from year to year, but can only be let on a tenancy from week to week at a weekly rent. Therefore here, too, we have to apply to what is undoubtedly a rateable subject-matter a test which is in reality inapplicable. By the terms of the statute the matter to be ascertained is at what rent this tenement might reasonably be expected to let from year to year upon the hypothesis that it could be so let, a somewhat difficult problem when such hypothesis is in fact found to be an impossible one. Under these circumstances one must get at the amount of such rent in the best way one can, applying the principles of the law of rating as far as they can be made applicable."

(1) (1888), 22 Q.B.D. 211; on appeal (1889), 53 J.P. 787; 22 Q.B.D. 703.

In *Railway Assessment Authority v. Southern Ry. Co.* LORD HAILSHAM, L.C. said (1):

"The definition requires an estimate of the sum which a hypothetical tenant might be expected to pay to a hypothetical landlord. It was well settled before the Act that it was necessary in estimating such a rent to take into account the owner of the hereditaments as a possible tenant (*R. v. London School Board* (2); *London County Council v. Erith Churchwardens* (3)); and, further, that the hypothetical tenant, though only a tenant from year to year, is supposed to have a reasonable prospect of continuing to be a tenant (*R. v. South Staffordshire Waterworks Co.* (4))."

This series of cases establishes that the hypothetical tenancy from year to year envisaged by the relevant section of the Rating and Valuation Act 1925 is for an indefinite time with an expectation that it will continue for more than a year. Such a tenancy must be assumed even though it is improbable or even impossible in fact.

I pause to mention LORD SORN's observations in *Langlands v. Midlothian Assessor* (5), where he said that the world of rating is a hypothetical realm in which there is no place for demolition orders. No doubt the point in the case was different, but the dictum in my view expresses the proper approach to the present problem.

Such being the construction of the statutory formula for the assessment of value I proceed to consider the decision of the Lands Tribunal. At the conclusion of their findings the member states):

"In the present case it is admitted that as a result of statutory proceedings a tenant would reasonably have anticipated the termination of his tenancy of the hereditament as it exists within about a year. It follows therefore that 'the possibility of its longer duration' is extremely remote and taking that fact into consideration a lower rent might reasonably be anticipated to be offered. The amount of that lower offer is agreed to be the figure of £3,050 determined by the Local Valuation Court."

The Lands Tribunal have, therefore, in my view contrary to the statutory formula, valued the hereditament on the basis of a tenancy for a term of years certain or at any rate on the basis that a tenancy for more than a year was improbable or impossible. Some difficulty may have been caused by undue emphasis on the expression "year to year" as if this was limited to a yearly tenancy. The expression "taking one year with another" which appears in the Valuation Metropolis Act 1869, quoted in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (6) and treated as having the same effect as a tenancy "from year to year", makes it clear that, although as a matter of valuation a yearly tenancy is to be assumed, the hypothesis is that it will be of indefinite duration. Such a construction is, in my view, implied in the statutory formula.

The Lands Tribunal and the Court of Appeal have placed great reliance on certain dicta in a number of rating cases as justifying the conclusion that the prospect of an early termination of the tenancy was a relevant factor in the assessment of the rateable value. At the outset of a discussion of these cases it is, I think, important to stress the distinction between the actual hereditament itself and the hypothetical method of valuation enjoined by the statute.

(1) 100 J.P. 123; [1936] 1 All E.R. 26; [1936] A.C. 266.

(2) 50 J.P. 419; [1886-90] All E.R. Rep. 379; 17 Q.B.D. 738.

(3) 57 J.P. 821; [1891-94] All E.R. Rep. 577; [1893] A.C. 562.

(4) (1885), 50 J.P. 20; 16 Q.B.D. 359.

(5) 1962 S.C. 341.

(6) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

As counsel for the valuation officer succinctly expressed it: "The beneficial occupation is factual. The tenancy is hypothetical."

WILLMER, L.J., prefaces his consideration of these cases with these words:

"While it is no doubt true that the world of rating is a hypothetical realm so far as concerns the presumed landlord and tenant, I do not think that this represents the whole picture. For the hereditament which has to be valued is a real and actual hereditament, the circumstances of which have to be evaluated in estimating what the hypothetical tenant from year to year would be prepared to pay for it."

In this he has, in my view, confused the actual hereditament with the method of valuation which is on a hypothetical basis.

In *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1) LORD PARMOOR said:

"In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the value of the beneficial occupation of the property or its profit-earning capacity."

In *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (2) SCOTT, L.J., said:

"... it is the duty of the valuer to take into consideration every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down, just because it is relevant to the valuation, and ought therefore to be cast into the scales of the balance..."

and later he said:

"Whilst the tenant is hypothetical, and the landlord who is to let to the tenant is necessarily also hypothetical, the hereditament is actual... All the intrinsic advantages and disadvantages must be considered and weighed. It is just that particular hereditament... with all its attractions for would-be tenants... and also with all its imperfections and drawbacks which may deter or reduce competition for it."

None of these cases in any way detracts from the principles previously expressed.

The basic law of valuation for rating purposes is that the ratepayer is assessed in respect of the beneficial occupation of the hereditament *rebus sic standibus*. To envisage that the hereditament will not support that beneficial occupation is to envisage a different hereditament. The actual circumstances are relevant so far as they affect the value of the beneficial occupation but they are inadmissible, in my view, in determining the length of time for which that beneficial occupation will continue.

The error into which the Court of Appeal fell was in considering the intention of the actual landlord to terminate the tenancy within a definite period as affecting the rateable value of the premises.

It remains only to mention the case of *Burley (Valuation Officer) v. A. & W. Birch, Ltd.* (3), decided by the same member of the Lands Tribunal who decided the present case. In that case the expressed intention of a private landlord to demolish the hereditament was held not to be a factor which could be taken into account in valuing the hereditament. This decision appears quite inconsistent

(1) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

(2) 101 J.P. 321; [1937] 2 All E.R. 298; [1937] 2 K.B. 445; *aff'd.* H.L., 102 J.P. 313; [1938] 2 All E.R. 79; [1938] A.C. 321.

(3) (1959), 5 R.R.C. 147.

with the decision of the Lands Tribunal in the present case. If the decision was right in the present case, it follows that it must have been wrong in *Burley v. Birch* (1). I am unable to see the distinction sought to be drawn between *Burley's* case where the intention to demolish was "at the whim" of a private landlord who might change his mind, and the present case where there was the practical certainty of demolition by a local authority. In my view, the decision in *Burley v. Birch* was right.

With most of the judgment of RUSSELL, L.J., I find myself in agreement, in particular with his statement of the question affecting the hypothetical tenant as being: "Will my yearly tenancy be cut short very soon?" But it is when he says that he finds nothing in principle or authority which excludes the view of the law found by the Lands Tribunal that I part company.

I would allow the appeal and remit to the local valuation court to fix the valuation at £3,400.

LORD PEARCE: The question here is whether reduction in value due to an impending demolition order comes within that area of rating where realities are acknowledged or within that where necessarily fiction prevails over fact. It is near the border-line which separates those areas. One has a natural inclination to prefer reality to fiction if and where this is compatible with the basis of rating, with the statute, and with the cases.

Rating seeks a standard by which every hereditament in this country can be measured in relation to every other hereditament. It is not seeking to establish the true value of any particular hereditament, but rather its value in comparison with the respective values of the rest. Out of various possible standards of comparison it has chosen the annual letting value. This is appropriate since the tax is charged annually. One therefore has to estimate "the rent at which the hereditament might reasonably be expected to let from year to year", the tenant paying rates, repairs, etc. This standard must be universal even though in many cases it demands various hypotheses. In practice, sewage works, portions of railway-lines, shops and factories where heavy and valuable machinery is installed are not let from year to year. So one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some estimate of what value should be attributed to a hereditament on the universal standard, namely a letting "from year to year". But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded insofar as they are accidental to the letting of a hereditament. They are acknowledged insofar as they are essential to the hereditament itself. It is, for instance, essential to the hereditament itself that it is close to the sea and that humans will pay more highly for a house close to the sea. One can therefore take that into account in the hypothetical letting. It is, however, accidental to the house that its owner was shrewd or that the rich man happened to want it and that therefore the rent being paid is extremely high. In the same way I think it would be accidental to the hereditament that its owner intended to pull it down in the near future. For the hereditament might have had a different owner who would not pull it down. So the actual owner's intentions are thus immaterial since it is the hypothetical owner who is being considered. But when a demolition order is made by a superior power on a hereditament within its jurisdiction different considerations apply. The order becomes an essential characteristic of the hereditament, regardless of who may be its owner or what its owner might intend. That particular hereditament has had branded on its

(1) (1959), 5 R.R.C. 147.



walls the words "doomed to demolition whatever hypothetical landlord may own it".

Thus the demolition order, by being a fact which is essential to and not accidental to the hereditament itself, *prima facie* cannot be excluded as irrelevant or shrouded by any necessary cloud of fiction. On this point I cannot accept LORD SORN's dictum to the contrary in *Langlands v. Midlothian Assessor* (1). Since, however, the fact of a demolition order relates to length of tenure, is it on that ground excluded by the express fiction imposed by Parliament in the words "let from year to year"?

SIR ALEXANDER COCKBURN, C.J., said in *Great Eastern Ry. Co. v. Haughley* (2):

"But I think it is one thing to start with the assumption that you are dealing with the tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises is necessarily to assume that his tenancy would not last beyond the year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account. It may be that the circumstances are such, that it is worth his while to deal with the stock as though he were certain that his tenancy would not be put an end to at the expiration of the year. He is to calculate for himself how much his stock will be depreciated and what it is worth his while to give, having taken that matter sufficiently into consideration. Now that seems to me to be a question of fact . . ."

And in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (3) LORD PARMOOR said:

"In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the value of the beneficial occupation of the property or its profit-earning capacity."

The Lands Tribunal relying on these two passages said:

"If the hypothetical tenant can 'consider the possibility of its longer duration' as 'one of the surrounding circumstances' which he can take into account in making his bid, it seems to me that it necessarily follows that a practical certainty that the lease will have no longer duration consequent upon the provisions of a statutory scheme is also a circumstance which can and should be taken into account, within the passage from LORD PARMOOR's speech . . ."

In no case has this exact point been decided. The words "let from year to year" raise the obvious question: "Is one in general thinking of a tenant who will be turned out at the end of a year, or a person who can enjoy an anticipation of staying on for a reasonable time?" For this must make a difference in the rent. LORD ESHER, M.R., answered that question in *R. v. South Staffordshire Waterworks Co.* (4):

"A tenant from year to year is not a tenant for one, two, three or four years, but he is to be considered as a tenant capable of enjoying the property for an indefinite time, having a tenancy which it is expected will continue for more than a year, but which is liable to be put an end to by notice."

(1) 1962 S.C. 341.

(2) (1866), 30 J.P. 438; L.R. 1 Q.B. 666.

(3) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

(4) (1885), 50 J.P. 20; 16 Q.B.D. 359.

This general principle has been accepted and followed in many cases (e.g., *Railway Assessment Authority v. Southern Ry. Co.* (1). Moreover, it is clearly right, I respectfully think, as a general principle. But should one append to the principle a gloss that, in particular circumstances where it is essential to the hereditament (and not due to any accident of ownership) that it cannot survive for more than a year, one may take that fact into account? This is what the Lands Tribunal and the Court of Appeal have done. Such a gloss is not inconsistent with any decided case. Nor would it offend against the spirit of the general rule laid down by LORD ESHER, M.R., and others. They did not have their attention directed to such a situation. I find nothing in the judgments to show whether, if attention had been directed to it, such a gloss would or would not have been acceptable. *Smith v. Birmingham (Churchwardens)* (2) does not, in my opinion, help on this point.

It is conceded, as I think it must be, that if the state or construction of some hereditament was such that it must predictably collapse in a year, its impermanence would be a relevant fact in estimating the rent, i.e., there could not be imputed to a hypothetical tenant the advantage of contemplating an indefinite continuance of tenancy. If this be right, I find it difficult to see why there should be a difference in principle between demolition by force of gravity (and the elements) and demolition by force of government. Both are superior forces which bear alike on a hereditament. Either may turn out to bear less hardly than was anticipated; but this is no more than saying that any prediction may be falsified by events. On principle, therefore, I think that the Lands Tribunal and the Court of Appeal were right.

I do not accept the argument that the hereditament that will either demolish itself by force of gravity or be demolished by force of government in less than a year (say eight months) proves that this view cannot be right. Under the Rating and Valuation Act 1925 one has to give the hypothetical tenant a tenancy from year to year and see what he will pay for it. In the normal case one tells him that he will have an indefinite prospect of continuance although the tenancy can be determined at the end of one year. In the suggested particular case one has to tell him that although he is being given a tenancy "from year to year" his actual occupation will almost certainly end in eight months. How much he would pay depends on what his view of the circumstances is (see the words of SIR ALEXANDER COCKBURN, C.J., in *Great Eastern Ry. Co. v. Haughley* (3)).

I appreciate that this view of the matter may cause some additional consideration and work, but I think with respect that undue alarm has been raised in argument. There is no trace of this alarm in the judgment at first instance which comes from a very practical tribunal. Inevitably more difficulties are caused when one tries to ascribe true values to hereditaments than when one excludes some element that does in real life cause variations of value and substitutes for it a hypothetical rule of thumb. But, in my view, the judgment of SIR ALEXANDER COCKBURN, C.J., shows that though much hypothesis is necessary, it should not be extended so as unnecessarily to exclude realities.

I would therefore dismiss the appeal.

LORD DONOVAN: The common-sense approach to this problem is, of course, to say that a tenant of premises soon to be demolished would pay less rent for them than he would otherwise offer; and that the rating assessment should give effect to this truth. If, however, Parliament by statute prescribes a

(1) 100 J.P. 123; [1936] 1 All E.R. 26; [1936] A.C. 266.

(2) (1888), 22 Q.B.D. 211; *on appeal* (1889), 53 J.P. 787; 22 Q.B.D. 703.

(3) (1866), 30 J.P. 438; L.R. 1 Q.B. 666.

formula by which the annual value of premises for rating purposes is to be measured, then the formula must be applied, whether the resultant valuation yields a figure either more or less than the figure obtainable in real life. Rating statutes are not unique in this respect. Under other taxing statutes a man may have no income at all in the year of assessment and yet be deemed to have a large one, simply because he had a large one the year before; and sometimes even if he had not.

Section 22 (1) (b) of the Rating and Valuation Act 1925, lays down the formula to be applied here. It is to be the rent reasonably to be expected if the hereditament were let from year to year, etc.; the section going on to say that the rent so estimated "shall . . . be taken to be the net annual value of the hereditament".

What has happened here is that in flat contradiction of the Act a lower rent than the formula would yield has been taken "to be" the net annual value; and the justification tendered for this is that the premises could not in fact be let from year to year because of the demolition order. This confers no right on anybody to ignore the statutory command that such a letting is to be assumed and to substitute a different formula altogether. If, for example, a preservation order had been made instead of a demolition order, thus increasing the security of tenure available, would an increase in the valuation have been permissible? Or in the case of a long lease? And how, on the basis of the existing decision, is a tenancy for eight months to be valued?

I share the views of everybody that it is unreal to ignore the fact of the demolition order; but if the statute requires the application of a formula which involves doing so, it is not for me to be astute in applying another.

I have read the opinion of my noble and learned friend, LORD GUEST. I entirely agree with it, and like him would allow the appeal.

LORD WILBERFORCE: It is agreed by both sides first, that a part of the hereditament whose rateable value is in dispute was reasonably likely to be demolished within about a year, and second, that a prospective tenant having regard to this probability, would be willing to pay £350 per annum less rent than one who did not. Can this reasonable probability of demolition and the impact it would have on an intelligent occupier be taken into account in assessing the hereditament's annual value for rating purposes? Common sense would seem to suggest that it should; the accepted structure of the law of rating that it should not; which is it to be? A natural inclination towards the common-sense solution is not enough to determine this type of issue, since a decision in favour of one ratepayer necessarily affects others, and it is important that the law of rating should be both uniform in its application and rational in principle. Moreover, any particular case must be decided against the wording of the statute and the background of authority.

It is convenient first to refer to statute, for it is on the statutory wording that the valuation officer's claim principally rests. The relevant words are those contained in s. 22 (1) (b) of the Rating and Valuation Act 1925 "... there shall be estimated the rent at which the hereditament might reasonably be expected to let from year to year. . . ." The interpretation of these words has come over the years to be invested with a good deal of learning, and even of mystery, but up to a point there is nothing very difficult about them. It is on the delimitation of the "actual", on the one hand, and the "hypothetical", on the other, that the argument in the present case takes its shape.

Let us start from the actual. The principle that the property must be valued as it exists at the relevant date is an old one, certainly older than the Parochial

Assessments Act 1836. It has been spelt out in modern terminology in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1) and in *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (2) in passages which have been cited. The principle was mainly devised to meet, and it does deal with, an obvious type of case where the character or condition of the property either has undergone a change or is about to do so; thus, a house in course of construction cannot be rated; nor can a building be rated by reference to changes which might be made in it either as to its structure or its use.

But it would surely be unreasonable to suppose that the hypothetical tenant is so inescapably imprisoned in the present that no anticipation is permitted of what is to come. Whether the test is what would influence his judgment, or what intrinsic qualities the hereditament possesses, any occupier in real life has to ascertain and to consider whatever may make his tenancy more or less advantageous over the period for which he takes it. I appreciate that the statutory hypothesis as to the length of the tenancy may have a bearing on what the tenant may take into account, and I shall shortly consider this critical point but, apart from this, it would seem clear that any occupier would take into account, not only any immediately actual defects or disadvantages (such as planning restrictions), but disadvantages, or advantages, which he can see coming. If the actual presence of a motorway close to the property depreciates it, or adds to its value, surely he must take account of a motorway whose irresistible progress will bring it alongside in six months—there is no presumption that juggernauts are immobile; and similarly of an airport, an open prison, or an open space. How much allowance ought to be made for the uncertainty, the speed of arrival, or the impact of such events, is no doubt a matter of estimation, but this is well within the expert field of the surveyor or land agent whose evidence he will supply. These persons are well aware that programmes jerk in their progress and can make suitable allowances for the movements in county halls.

But now we must consider the tenancy's period, and we have the words, claimed to be decisive, "to let from year to year". It is said that these limit, and in this case totally exclude, the common-sense approach; that they require us to assume a tenancy of a particular kind known to the law, of indefinite duration though determinable by notice, which assumption is inconsistent with, and so excludes, the possibility or probability of impending demolition.

My Lords, I have no desire to derogate from the elegant technicality of the law of rating, which in some respects is commendable and useful. Where so many separate operations have to be carried out every year, firm and logical rules are very necessary. But I do not think that the history of this expression supports a technical interpretation, at least so technical as it bears in the law of real property. The Poor Law Relief Act 1801 (43 Eliz. 1, c. 2) contained no reference to any tenancy period; and it was left to the judges to determine, as they did over a series of decisions, on what principles the annual value was to be arrived at. One case, shortly before the Parochial Assessments Act 1836, illustrates the process: *R. v. Adames* (3), where the question was whether an occasional sewers' rate should be taken into account in fixing the annual value. PARKE, J., said:

"It is obvious that the average annual net profit of one description of land is not the same as that of the other; and, both upon principle and authority, we think the rate ought to be made in proportion to that profit . . . Now

(1) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

(2) 101 J.P. 321; [1937] 2 All E.R. 298; [1937] 2 K.B. 445; *affd.* H.L., 102 J.P. 313; [1938] 2 All E.R. 79; [1938] A.C. 321.

(3) (1832), 4 B. & Ad. 61.

it is quite clear it ought not to be made according to the profit derived by the occupier himself; for if that were so, the rate must vary according to the nature of the occupier's interest. An occupier who is tenant at will at rack-rent, and therefore receives a less share of the annual profit of the land than one who is tenant for years at a small rent, and still less than one who is a tenant in fee simple, and pays none at all, would be rateable at a less sum; a proposition which was never yet contended for . . . This being so, it follows that, in order to make an equal rate, the nature of the occupier's interest must be disregarded, and the rate imposed according to some value of the subject of occupation. Usage and convenience have established this value to be not that of the estate or property itself, but that of the profit which is or might be made from the estate or property; and as it would be very difficult and extremely troublesome to ascertain the precise value of that profit during the time for which each rate is made, and in case of occasional profit both troublesome and unjust (*R. v. Mirfield (Inhabitants)* (1), *R. v. Hull Dock Co.* (2)), to make a rate for a large sum at one time and a small one or none at another, upon the same land, the rule has been to assess according to the annual profit of the land; or, where the produce is not matured in one year, then upon an average of years, from which profit deductions are allowed for all the expenses necessary to its production. It is not material whether the whole or a certain aliquot part of that net profit be rated, provided all lands of the same description are rated equally upon that aliquot proportion of the profit; and in practice it is usual, and it is most convenient, to rate lands at the rack-rent which they would pay to a landlord, or some certain portion of it, the tenant paying all rates, charges and outgoings; which is in effect rating according to a part of the net profit only; but provided it be the same aliquot part in all cases, it makes no difference."

This passage, and it is typical, illustrates very well the practical approach of the judges, and I would assume that when the Parochial Assessments Act 1836 provided a—statutory definition of "net annual value" as—"the rent at which the [hereditament] might reasonably be expected to be let from year to year, free of all usual tenant's rates and taxes . . ." it was endorsing this approach.

It is interesting to note that as regards the metropolis the Valuation Metropolis Act 1869, adopted a different verbal formula—that of the annual rent which a tenant might reasonably be expected, taking one year with another, to pay; but this has always been regarded as supplying an identical test. The leading case of *Poplar* (3) to which I have referred was decided under it.

So we should regard the words "from year to year" as meaning no more than that the tenancy is not a fixed or definite one, it is one of indefinite duration, determinable by notice, but not, I would think, according to the technicalities governing the giving of notice in tenancies of this kind. What, then, are we to say of the tenant's expectations and of the rent he is consequently willing to pay? I see no reason why, if there is evidence to prove it, a greater and more reliable expectation of continuance should not be allowed to affect his calculation. In this I am content, as this House did in *Consett Iron Co., Ltd. v. Durham (North-Western Area) Assessment Committee* (4) to follow *SIR ALEXANDER COCKBURN, C.J.*, in *Great Eastern Ry. Co. v. Haughley* (5):

(1) (1808), 10 East. 219.

(2) (1816), 5 M. & S. 394.

(3) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

(4) 95 J.P. 98; [1931] All E.R. Rep. 62; [1931] A.C. 396.

(5) (1866), 30 J.P. 438; L.R. 1 Q.B. 666.

"I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account."

Then if "longer", why not "shorter", if that is material to the tenant's calculations? The present case provides a good test either way. So long ago as 1946 the Birmingham City Council made an order for the compulsory purchase of some 200 acres including a part (the "red portion") of the relevant lot—this order was confirmed in 1947. The plan annexed to the compulsory purchase order showed the "red portion" as due for redevelopment in 1965 in connection with a road widening scheme. The red portion was acquired by the corporation in 1949 and let to the ratepayers on an annual tenancy. We do not know on what basis the annual value was assessed during the period from 1949-63—probably the matter was never attended to with any accuracy, but it would not have been wrong, in this period, to assume a probable continuance of the annual tenancy for a considerable time. At any rate a new proposal, that we are now considering was made on 27th September 1963. The agreed facts include that any actual tenant taking a tenancy at this date would have paid less rent (viz., £350 per annum less) in each year if it was known or reasonably anticipated that the red portion would be demolished within about a year; and that at the proposal date it could have been reasonably anticipated that the red portion would be required for road widening within about a year.

In my opinion, these agreed facts provide amply sufficient basis on which to fix (as the Lands Tribunal did fix) the lower basis of annual value. The circumstances were actual and intrinsic and such as would affect a prospective tenant's mind; there is nothing in them which requires any contrary assumption to that of a tenancy from year to year—they are consistent with such a tenancy with severely reduced expectation of renewal.

The arguments for the valuation officer are four. First, it is said that the Lands Tribunal proceeded on the assumption that the ratepayers were taking a tenancy for a year certain, which assumption is not permissible under the statutory formula. But I do not accept this. The tribunal had before them the dates as I have stated them above, which lead to an anticipation of demolition in "about a year", on the dates rather more than a year. This anticipation may well have been too confident and too definite, the consequent deduction may have been too great—I endorse neither—but it was agreed by both sides; it fits perfectly well into the conception of a tenancy from year to year whose duration is likely to be curtailed.

Secondly, it was claimed that to allow a prospect of this kind to enter into the estimation of rent would necessitate yearly, or more frequent, revisions of rateable values, on a kind of sliding scale as the critical event approaches. I think that these are exaggerated fears. Annual values may indeed diminish (or increase) together with the progress of matters that affect them but, as this case shows, the curve of change is not an even one, it is more likely to move in quanta jumps and, when one such occurs, it would be unjust not to allow it to take its effect.

Thirdly, the logical difficulty was put that if it is permissible to suppose a yearly tenancy with diminished prospect of renewal, the consequence would follow that an anticipated demolition (or similar events) within a year (e.g., in six months) must also be taken into account, yet this would be flagrantly contrary to the statutory hypothesis. The case may be debatable, but it is not before us and it is further complicated by statutory provisions—see the Local Government Act 1948, s. 42, and the General Rate Act 1967, s. 79. I do not think that it is comparable with or should affect those where the anticipated event is outside the hypothetical year.

Lastly, it was suggested that to allow this reduction would destroy the necessary basis of uniformity between one lot and another. This would be a serious objection if the fact were so, but it is not. The essence of the ratepayers' claim is that their hereditament differs from others in the locality. It is as if on the red portion, but nowhere else, there were fixed a board inscribed "Due for demolition in 1965". There is nothing, happily, in rating law which prevents a property with such a mark of death from being assessed differently from its unmarked neighbours.

In my opinion the Lands Tribunal reached a correct decision and I would dismiss the appeal.

LORD PEARSON: My Lords, in my opinion, there is in the law of valuation for rating a principle that the statutory "machinery", which at the material time was contained in s. 22 (1) (b) of the Rating and Valuation Act 1925, is adaptable and should, whenever this is possible, be so operated as to produce a just and true result, attributing to the hereditament its actual annual value—the real value of the beneficial occupation to the occupier—rather than some artificial and fictitious value. The words of s. 22 (1) (b) which are material for the present purpose are these:

"... there shall be estimated the rent at which the hereditament might reasonably be expected to let from year to year... and the annual rent as so estimated shall, for the purposes of this Part of this Act, be taken to be the net annual value of the hereditament."

The principle was strikingly illustrated by the decision and reasoning of this House in the case of *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1). In that case the hereditament was subject to the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, which restricted the rent which a tenant could be required to pay to his landlord. The restricted rent for the hereditament was less than the true value of the occupation. In order to produce the right result—coincidence of the annual value for rating purposes with the true value—it was held that the rent was as hypothetical as the landlord and the tenant, and that the hypothetical tenant might reasonably be expected to pay to the hypothetical landlord a hypothetical rent greater than the restricted rent, though no actual tenant would pay more than the restricted rent. **LORD BUCKMASTER** said:

"So far as the occupier is concerned, the provisions of the Rent Restriction Act have not in any way made his occupation less beneficial... If... the rent which has to be ascertained under the section is the real rent, then the fact that that cannot be increased will have a material effect upon the valuation. I agree, however, with what was said by counsel for the appellants that so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up. Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment."

(1) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

In Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee (1) (affirmed in the House of Lords) SCOTT, L.J., said:

"The objective being the real value of the actual hereditament, the inquiry is primarily economic, and not legal; it is legal only in so far as logical relevance is the measure of legal admissibility. That the value is to be expressed in the terms of the statutory definition of gross value is 'nothing to the matter', as LORD HOLT would have said. That definition does not prevent the objective being the real value; it merely states certain data in regard to the terms of the hypothetical tenancy which are to be assumed in order to get a fixed instead of a variable figure. Some terms must be assumed by every valuer in any calculation: the statute merely chooses the terms, in order that all resultant figures may be strictly comparable; but the statutory definition contains no provision which prevents real value being the one and only objective of the inquiry."

The material facts of this case were agreed between the parties and set out in the decision of the Lands Tribunal and incorporated into the Case Stated. The hereditament as shown on the plan consisted of a major part coloured blue ("the blue area"), having a frontage of 340 feet on Adams Street, and a minor part coloured red ("the red area") which jutted out from the back of the blue area and extended to a frontage of 53 feet on Dartmouth Street. The ratepayers were at one time the owners as well as the occupiers of the entire hereditament. But in 1946 the Birmingham Corporation made a compulsory purchase order in respect of a larger area which included the red area. In 1947 the order was confirmed by the Minister, and in 1949 the Birmingham Corporation acquired the ratepayers' interest in the red area and thereupon let the red area to the ratepayers on an annual tenancy. But the hereditament was still treated as one hereditament comprising both the blue area and the red area. The ratepayers as occupiers of the hereditament on 27th October 1963, made a proposal for reduction of the assessment.

It was agreed that any actual tenant of the hereditament taking a tenancy thereof on the date of the ratepayers' proposal would have paid less rent in each year for the hereditament if it was known or reasonably anticipated that the red area would be taken over and the buildings demolished for road widening purposes within about a year. It was also agreed that at the date of the proposal it could have been reasonably anticipated that the red area would be required for road-widening purposes within about a year. It was further agreed that, if the proposed demolition on road widening of a portion of the hereditament could be taken into account in assessing the rateable value, the rateable value had been correctly assessed by the local valuation court at £3,050, while if such proposed demolition could not be taken into account the rateable value should be £3,400.

Thus, the probability of a demolition of a portion of the hereditament within about a year by action of the Birmingham Corporation did in fact reduce the annual value of the hereditament, and the lower figure of £3,050 was the actual annual value. *Prima facie* that is the figure at which the rateable value should be assessed. But can the statutory "machinery" be so operated as to produce that result? I think it can.

First, it is conceded on behalf of the valuation officer that the special features of this case, that at the material time the Birmingham Corporation had acquired the ownership of the red area and had let it to the ratepayers, can be disregarded for the purposes of this appeal. The concession was made because it is not desired

(1) 101 J.P. 321; [1937] 2 All E.R. 298; [1937] 2 K.B. 445; *affd.* H.L., 102 J.P. 313; [1938] 2 All E.R. 79; [1938] A.C. 321.

to have the case decided on a narrow ground which would not be generally applicable. But I think that, even without any such concession, these special features would have to be disregarded, because the Birmingham Corporation, being in that position, could not be the hypothetical landlord. The hypothetical landlord, Mr. X, must be the owner of (or at any rate in a position to let) the entire hereditament and must not have let any portion of it already. The Birmingham Corporation did not have these qualifications.

Secondly, at the material time, the hypothetical landlord is assumed to have granted, and the hypothetical tenant to have taken, a tenancy from year to year of the entire hereditament, comprising both the blue area and the red area. The assumed tenancy is a normal tenancy from year to year, running on indefinitely until terminated by notice. There has not been in this appeal any argument or discussion as to the required length of the notice or when it must expire, and I am not expressing a concluded opinion, but I think it is usually taken to be a six months' notice expiring at the end of the first or any later year of the tenancy. Therefore, the tenancy may be terminated by notice at the end of the first year or it may have a longer duration. The nature and the terms of the hypothetical tenancy could be the same in this case as in any other case.

Thirdly, as the Birmingham Corporation could not be the hypothetical landlords, their demolition action, if and when it came, must be considered to involve an exercise of statutory powers. They would enter into possession of the red area, ousting the hypothetical landlord from his ownership and the hypothetical tenant from his occupation, and they would demolish the buildings and convert the site to form part of the widened roadway. I do not know exactly what is then supposed to happen to the hypothetical tenancy of the entire hereditament. Perhaps the hypothetical parties arranged in advance that, if and when the Birmingham Corporation carried out their demolition action, the tenancy would continue at a reduced rent for the reduced hereditament. Or perhaps that hypothetical tenancy could come to an end and the hypothetical parties would have to negotiate a new one in respect of the new hereditament consisting only of the blue area. I do not think a final answer to this question has to be given in this appeal, but I shall assume in considering the valuation officer's argument that the demolition of a portion of the hereditament would bring to an end the hypothetical tenancy of the entire hereditament.

Fourthly, although the demolition was expected to happen within about a year, there was no certainty that it would happen so soon or even that it would happen at all. The policy might be reversed, or the implementation of it might be postponed, owing to developments in the financial, economic, administrative or political situation, whether national or local. The phrase "practical certainty" was used by the Lands Tribunal in a passage near the end of the decision, but in my opinion it was not warranted by the agreed facts set out in the earlier passage of the decision. There was a reasonable expectation, a probability, that the demolition would take place in about a year. It was a sufficient probability to affect the mind of the hypothetical tenant and so to reduce the rent that he would be willing to pay.

That is how I envisage the operation of the statutory "machinery" in relation to the facts of this case. There would be a normal hypothetical tenancy from year to year subject to the external risk that within about a year the local authority (not a party to the hypothetical tenancy) would in the exercise of statutory powers step in and demolish a portion of the hereditament. Because of that risk, which was regarded as a probability, the hypothetical tenant would be willing to pay only a reduced rent. That is the result produced by operating the statutory

"machinery", and it accords with the real fact that the actual annual value of the hereditament was reduced. The lower figure of £3,050, giving effect to the reduction in value, should be entered in the valuation list as the rateable value of the hereditament.

I think the main argument for the valuation officer, which has been clearly and cogently presented, is that one cannot bring into account the probability of a portion of the hereditament being demolished in about a year without destroying the hypothesis, required by statute, of a tenancy from year to year. Put at its highest the argument was that the ratepayer's contention and the Lands Tribunal's decision necessarily assumed that the tenancy would come to an end in a year, and therefore it would be in effect a tenancy for one year only, which would not comply with the statutory requirement. To the valuation officer's argument so presented there is the simple answer that on the agreed facts it could not be assumed that the hereditament *would* come to an end in a year; it might go on for several years. But the argument for the valuation officer can also be presented in this form: that, although the statute is silent on this point, authoritative dicta (especially in *R. v. South Staffordshire Waterworks Co.* (1) and *Railway Assessment Authority v. Southern Ry. Co.* (2)), have put a gloss on the statute, requiring a reasonable expectation of continuance of the hypothetical tenancy; and a reasonable expectation of continuance cannot be reconciled with a reasonable expectation of termination within about a year; and therefore the reasonable expectation of termination within about a year must be disregarded in order to permit the application of the statutory measure of value as authoritatively interpreted. In my opinion, however, the authoritative dicta should not be understood as putting a gloss on the statute. The statute requires quite simply a tenancy from year to year, and that is a tenancy which may be determined at the end of the first year or may run on for several years or many years. The circumstances of a particular case may show that the hypothetical tenancy from year to year is likely to be long (e.g., where the subject-matter is or forms part of a waterworks undertaking or a railway undertaking) or that it is likely to be short (as in this case). That seems to me to be the right inference from the passage in the judgment of SIR ALEXANDER COCKBURN, C.J., in *Great Eastern Ry. Co. v. Haughley* (3) which was cited by LORD SANKEY, L.C., in *Consett Iron Co., Ltd. v. Durham (North-Western Area) Assessment Committee* (4) as stating the true principle to be applied. SIR ALEXANDER COCKBURN, C.J. said:

"... it is one thing to start with the assumption that you are dealing with a tenancy from year to year, and another thing to say that the hypothetical tenant, in calculating what he can reasonably pay as rent for the premises, is necessarily to assume that his tenancy would not last beyond a year. I think the possibility of its longer duration is one of the surrounding circumstances which the tenant from year to year would take into account. It may be that the circumstances are such, that it is worth his while to deal with the stock as though he were certain that his tenancy would not be put an end to at the expiration of the year. He is to calculate for himself how much his stock will be depreciated and what it is worth his while to give, having taken that matter sufficiently into consideration. Now that seems to me to be a question of fact for the sessions..."

(1) (1885), 50 J.P. 20; 16 Q.B.D. 359.

(2) 100 J.P. 123; [1936] 1 All E.R. 26; [1936] A.C. 266.

(3) (1866), 30 J.P. 438; L.R. 1 Q.B. 666.

(4) 95 J.P. 98; [1931] All E.R. Rep. 62; [1931] A.C. 396.

It was also said on behalf of the valuation officer that equality of rating requires that each hereditament should be valued as it now is—*rebus sic stantibus*—and the prospect of a future partial destruction of it must be disregarded. But it seems to me that this point can be turned against the valuation officer. In the expression *rebus sic stantibus* which are the *res*? In other words, which are the factors to be taken into account in order to produce equality of rating? There is, in this case, a present probability of a future happening, and the present probability affects the present value of the hereditament. There is inequality of actual values if of two otherwise identical hereditaments one is likely to have part of it demolished within about a year and the other is likely to remain intact. If they had to be deemed to be of the same value, although in fact one is worth less than the other, there would be artificiality and fiction and unfairness in the valuations. LORD PARMOOR said in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1):

“In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the value of the beneficial occupation of the property or its profit-earning capacity.”

The mind of the hypothetical tenant would be affected by the prospect that within about a year he would probably lose a portion of his premises, whether the loss was expected to arise from some physical cause such as a building being brought down by subsidence or sliding over clay into the sea or from some governmental action such as requisition by a Minister or dispossession and demolition by a local authority.

Also it was said on behalf of the valuation officer that, if the prospect of future dispossession and demolition is to be taken into account, the valuation in such a case will have to be changed progressively as the expected date of demolition approaches. That is, in my opinion, a valid argument *ab inconvenienti* so far as it goes. On the other side, it was pointed out that the same problem is presented in any case of a progressive change in relevant circumstances, e.g., progressive deterioration of a district or progressive redevelopment of an adjoining district affecting the value of a shop. Also, as was pointed out by the Court of Appeal, a tenancy from year to year is of indefinite duration and may be terminated even at the end of one year, and the value of such a tenancy is not materially affected by the prospect of an event which is not likely to take place within a relatively short period of time. Moreover, valuers may reasonably be inclined to take a sceptical view of forecasts as to the exact time at which governmental action will be taken. The present case affords a warning: I understand that the dispossession and demolition, which were expected to take place within about a year, did not in fact take place for several years.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Sherwood & Co., for Johnson & Co., Birmingham.*

G.F.L.B.

(1) 86 J.P. 137; [1922] All E.R. Rep. 191; [1922] 2 A.C. 93.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WIDGERY, L.J., AND LAWTON, J.)

February 21, 1969

R. v. BARDOE

Criminal Law—Reference by Home Secretary—Power to refer part of use—Reference for review of sentence—Refusal of court to hear argument in regard to conviction—Criminal Appeal Act 1968 (c. 19), s. 17 (1) (a).

Under s. 17 (1) (a) of the Criminal Appeal Act, 1968, the Home Secretary has power to refer part of a case only to the Court of Appeal for review, e.g., that part which deals with the sentence imposed. In such a case the court may refuse to hear any argument with regard to conviction.

REFERENCE by the Home Secretary under s. 17 (1) (a) of the Criminal Appeal Act, 1968, treated as an appeal against sentence.

The defendant, James Noble Bardoe, appealed against sentence, leave to appeal against conviction having been refused.

On 15th November 1967, the appellant was convicted at Kent Assizes of murder and was sentenced to life imprisonment. Although he was aged 18 at the date of sentencing, he was only 17 years old when the offence was committed on 11th July, 1967, and, therefore, the proper sentence was an order under s. 53 (1) of the Children and Young Persons Act 1933, that he should be detained during Her Majesty's Pleasure and not a sentence of life imprisonment. The attention of the trial judge was not drawn to the appellant's age at the time when the offence was committed. The Secretary of State referred the case to the Court of Appeal "in order that the court may review the sentence imposed".

J. H. Gower, Q.C., and M. H. Johnson for the appellant.

LORD PARKER, C.J., giving the judgment of the court, stated the facts and continued: In the circumstances the court accedes to the appeal, sets aside the sentence of imprisonment for life, and substitutes an order that the appellant should be detained during Her Majesty's Pleasure. In addition, counsel for the appellant has raised the point here that he is entitled to argue an appeal against conviction, albeit that the appellant has been refused leave to appeal against conviction. His argument is, if the court understands it aright, that under s. 17 (1) (a) of the Criminal Appeal Act, 1968, the power in the Secretary of State is a power to refer the whole case to the Court of Appeal, whereupon the case shall then be treated for all purposes as an appeal to the court by that person. He says, therefore, that the only power here is to refer the whole case, and since the whole case is referred, that covers not only sentence, which was the specific object of the reference, but also conviction. This court is quite unable to accept that argument. It seems to the court perfectly clear that a power to refer the whole case includes a power to refer part of the case, and in this particular case the part that was referred was the review of the sentence and that alone. Accordingly, this court is not prepared to hear any argument in regard to conviction.

Appeal allowed.

Solicitor: Registrar of Criminal Appeals.

T.R.F.B.

COURT OF APPEAL

(DAVIES, L.J., LYELL AND DONALDSON, JJ.)

R. v. GREGORY AND MILLS

February 21, 1969

Criminal Law—Sentence—Consecutive sentences—Undesirability of part of sentence on second indictment being made to run consecutively to sentence imposed on first indictment.

Where a defendant is convicted on both of two indictments it is undesirable that a portion of the sentence on the second indictment should be directed to be consecutive to the sentence on the first indictment, and a sentence in that form should not be imposed.

APPEALS by Colin Gregory and Michael James Mills against sentences of 21 months' imprisonment imposed by MACKENNA, J., at Leeds Assizes when they had pleaded guilty to an indictment charging them with storebreaking and larceny and to a second indictment charging them with storebreaking with intent.

S. Levine for the appellants.

J. S. Snowden for the Crown.

DAVIES, L.J., delivered this judgment of the court: The appellants, who were given leave to appeal against sentence by the full court on 16th January 1969, came up before MACKENNA, J., at Leeds Assizes on 25th June 1968, when they, with other accused, pleaded guilty to an indictment charging them with storebreaking and larceny and to a second indictment charging them with storebreaking with intent. On the first indictment all the accused were sentenced to 18 months' imprisonment. On the two appellants the judge passed a sentence of 18 months on the second indictment and directed that three months of that sentence should be consecutive to the sentence on the first indictment. It is on that point, the form of sentence, that the full court gave leave to appeal against sentence. Counsel have not been able to find any authority for the proposition that a second sentence can be made partly consecutive to a first sentence. It is quite obvious that administrative difficulties might, in some cases, as has been pointed out by counsel for the appellants, arise out of the imposition of a sentence in that form. It probably would not do so in the present case, since the court has been informed by the prison governor that the sentence is being treated as one of 21 months.

The court has come to the conclusion that to impose a sentence in this form is undesirable and wrong and that such a practice should not be followed. If the judge considered that a sentence of 21 months was appropriate, he could achieve that end in a number of different ways, for example, by giving concurrent sentences of 21 months or consecutive sentences of 12 and 9 months as to which there could be no complaint. In the opinion of this court, the desired end should be attained in one of these two ways or possibly by other means. We pass now to consider the overall length of the sentences. [HIS LORDSHIP stated the facts, and said that, in the case of the appellant Gregory, concurrent sentences of 18 months' imprisonment on each indictment would be imposed, and in the case of the appellant Mills concurrent sentences of 12 months on each indictment would be imposed.]

Sentences varied.

Solicitors: *Registrar of Criminal Appeals; M. D. Shaffner, Wakefield.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WINN AND WIDGERY, L.JJ. AND LAWTON, J.)

February 13, 1969

R. v. O'SULLIVAN

Criminal Law—Evidence—Handwriting—Need of expert evidence—Warning to jury.

A judge should never invite or exhort a jury to look at disputed handwritings for the purpose of making comparisons without the aid of an expert, and he should warn them of the dangers of doing so, but where the disputed documents have already been put before the jury as part of the probative material in the case, all that can be done as a matter of practical reality is to ask them not to make comparisons and clearly to bear in mind that they are not qualified to do so.

APPEAL by John David O'Sullivan against his conviction at Inner London Quarter Sessions before the deputy chairman of larceny as a servant. He also appealed against his sentence of 12 months' imprisonment.

C. V. Nicholls for the appellant.

M. Gale for the Crown.

WINN, L.J., delivered this judgment of the court: This is an interesting and indeed an important case which has been extremely well argued both by counsel for the appellant and also by counsel for the Crown. It involves—though it is convenient first to state the general narrative and background—a question of handwriting and the way in which a court should deal with questions of similarity of handwriting if and when any question of that kind arises in the course of trial.

The appellant was employed for about seven years as a salesman and to some extent a porter by a firm called British and Colonial Furnishing Co., Ltd. For about two years before the relevant events he had been working in London Road at their shop there which traded under the name of Smarts and banked with Westminster Bank, Ltd., at Newington Causeway branch. This particular firm had a system of obtaining security for cash and other valuables for short periods of time by depositing such things in this branch of the bank, their bankers, in one or other (sometimes in both) of two leather wallets which bore numbers, respectively, 1777 and 1778, overnight or over a weekend, as the case might be. There was a well established and proved system whereby the cashier usually went to the bank with such wallets but always with the protection of at least one and usually two male representatives of the firm. In the course of that practice, on a Saturday night, or possibly on the following day, the Sunday, but at any rate before or during the weekend, both these wallets were deposited in the night safe of the bank. On the morning of the following Tuesday the cashier went to the bank with the appellant and another man, both wallets being then there. She was asked to speak to the senior cashier, who spoke a cautionary word about the desirability of having straps on such wallets. Then one of the wallets was opened by the cashier, having been handed to her by the bank representative, and the money in it was paid into the bank account of the firm. The other wallet was left in the bank, no. 1777. The empty one, no. 1778, was taken away under the jacket of the appellant.

The next event, which was the vital one, happened shortly after midday the same day—within, therefore, quite a brief period of time. When the earlier call which has been described took place a certain Miss Clements, a bank official, saw those who came that day, Miss Rivett, the appellant and another man,

and she had seen during the period of some 2½ weeks during which she had been on duty at this bank, on relief duty, several times during that period this same man, the appellant, coming and going in the course of such transactions as have been mentioned. At 12 noon or soon after she was alone on duty in the bank, though, no doubt, there was in some inner room a senior official of the bank; she was alone at the counter. According to the evidence which she gave at the trial, a man came in very soon after 12 noon, and asked for no. 1777 wallet in the name of Smarts, saying he wanted Smarts' wallet, giving that number. According to her evidence, she recognised him without any doubt at all as being the man she had seen there earlier that morning, namely, the appellant. She gave the man the wallet, and asked him to sign for it, and, according to her, in her presence that man did sign. The register was available at the trial and the jury had photostats of it. On the fifth line an entry appeared of the withdrawal on 20th February of no. 1778 and on the top line there purported to be an entry of the withdrawal of no. 1777. Against each of those was a word or name, somewhat resembling the name Sullivan or O'Sullivan, and the two of them somewhat resembled one another. The entry of the fifth line was admittedly made without any doubt at all by the appellant during the earlier morning visit. There was evidence that Miss Clements made that identification in her own mind at the time and that she had seen the signature being placed on the register. An identification parade was held two days later on 22nd February, the Thursday, and Miss Clements picked out the appellant as being the man to whom she had delivered the wallet. A perfectly proper cross-examination was carried out on behalf of the appellant at the trial to see whether it could be effectively suggested against her, so that the jury might lose confidence in her evidence, that she had what is sometimes called her own axe to grind in that she had admittedly given this wallet to one purported representative of Smarts, whereas the banking procedure and instructions to her were that she should only deliver a wallet to two representatives, and it was suggested that she was covering up for her own error. A witness called Parker, who was the other salesman who came and went on such errands to the bank and had been there earlier in the morning, gave evidence that the appellant left the shop at about midday for his customary lunch break and returned at about 1.25 p.m. A very important feature of this case was established by the evidence of Mr. Kohler, the shop manager, that there were only four people beside himself who knew these wallet numbers, and they were the head clerk, a certain Mrs. Wylie, the cashier already mentioned, Miss Rivett, Mr. Parker, already mentioned, and the appellant. There was therefore a narrow circle circumscribed by those facts within which, it was contended, was to be found the perpetrator of this theft of the wallet. Of course, it need hardly be added that the wallet was not seen again. On the next day, 21st, the Wednesday, detective constable Cox, according to his evidence, saw the appellant and told him what the trouble was, and the appellant said, "Well, it was not me" and, asked about time, said he went straight home to lunch, using the firm's van, and that his wife was at home, being sick and not able to go to work; he did not fancy his dinner so he ate nothing but stopped at a pub on the way back and had a couple of gins. It is to be observed that the appellant and his wife did not precisely agree about the time at which he arrived home for this luncheon break. She thought it might have been as late as 35 minutes after midday, i.e., 25 minutes short of 1.0 p.m., and that would, according to police evidence and a check made, have given him time to carry out this theft before going on to his home. The defence always was that it was a

mistake, a misidentification, and that he knew nothing about it, and that he was perfectly innocent.

It is a serious case because he is a man of 27, married, earning £25 or £30 a week, with a wife working as a conductress, and apart from one fairly trivial previous conviction at the age of 18, some considerable time ago, he had a perfectly clean character. It was a very stupid thing for a man to do since the finger of suspicion would be pointed, as he ought to have realised if he had any sense, so directly at him.

The real point of this appeal is that notwithstanding the great strength, as it seems to this court, of that identification which was an identification by Miss Clements who had seen the man quite often in the course of the previous three weeks, the corroboration of her identification—not of course any corroboration required as a matter of law—was very largely to be found, if properly to be found, in the fact that his signature appeared on the register. When the matter was first referred to by the learned deputy chairman he said:

“Members of the jury, of course you will all want to look at this document, and I have something more to say about the question of the signature. Look at the signature on the top right sheet, and consider whether you think that that, in fact, was [the appellant's] signature, or whether or not at least, it indicates that whoever made that signature, if it was not [the appellant] was having a shot at making a signature which looked something like [the appellant's] signature.”

That passage which could, the court recognises, be construed as some sort of invitation to the jury to look at the signature and consider what its effect was in their minds, occurred in a context which controls that remark or invitation in as much as the learned deputy chairman had been fairly, lucidly and without bias tabulating the coincidences or special factors which had to be assumed as a matter of logic if the view were to be taken that some person other than the appellant had taken this wallet. He said, for example, it must have been somebody who knew of the procedure for getting the wallet from the bank; it must have been somebody who either knew that one of the firm's wallets was in the bank or there was a fair chance of it being there, and must have known the number of this particular wallet left in the bank when the other was taken away. Somebody also—and this is where the matter is particularly relevant—he rightly said who knew the appellant's name and his initials, and that he was one of the people entitled to draw wallets of the firm from the bank.

The trial of this case was made very much more difficult and the approach of the learned deputy chairman to this problem of handwriting was made awkward, and indeed intractable, by the policy adopted at the beginning of the trial and for some considerable time pursued by the defence of asking that the jury should have the opportunity of checking the register and alleged register signature against other genuine signatures of the appellant, and that made the case much more difficult also for counsel for the Crown. It made it much more difficult for everybody since, until it was first raised by the defence that there was going to be a challenge, there was no reason whatever for the prosecution to foresee that this entry in the register would be challenged as a bogus, forged entry.

In the circumstances, the learned deputy chairman set out to navigate amongst the reefs knowing well the decision in *R. v. Tilley* (1) to which reference would have to be made, and he set himself strenuously to warn the jury against the dangers implicit in their making comparisons of writing without being expert, as of course they were not, and without the assistance of any

witness who was expert about handwriting. He reminded them that it had not been the final policy of the defence to allow or request that the jury be allowed to compare the signatures. He reminded them, without mentioning, I think, the name of the case, that higher courts had several times said that it was extremely difficult and dangerous for juries to make comparisons, and he said:

"... it is very dangerous for you or me—we are not experts at this sort of thing—to start looking at signatures and comparing them, and saying yes, they are the same, or no, they are not."

And he said:

"... my advice to you is to be very very careful indeed about just looking at those two signatures."

Then he said:

"... you may well think, looking at these two signatures, that all one can say at the end was, well there is some similarity... my advice to you would be, be very very cautious about going into any details in comparing these two."

The point is one of importance and indeed from time to time the courts have had to consider it. It seems to this court that possibly there has been a misunderstanding from a very early date of what was said by BLACKBURN, J., in *R. v. Harvey* (1). That was a case where there had been an objection taken by the defence to certain evidence found in the house of the prisoner, certain copy books said to contain his handwriting, on the ground that police officers are not competent to give evidence as experts as to handwriting. The learned judge said—and he has been accepted as one of the greatest judges this country has ever had the fortune to possess:

"But the jury can inspect them and compare them with the forged document. [He went on to say] But still they are only copy books, which go no further than to show that the prisoner was taught writing. I think the evidence is very weak, and I do not think the jury ought to act on it without the assistance of an expert. The policeman is certainly not a skilled witness... [and in three lines he gave his ruling:] But here we have no expert and I do not think it would be right to let the jury compare the handwriting without some such assistance. The evidence is very slight."

It seems to this court today that that was a ruling of a very narrow character indeed. The learned judge was saying: "in this particular case: (a) we have no expert; (b) the evidence is of very poor evidentiary value; therefore I am going to exercise my discretion in not allowing it to go to the jury".

Now there has been a long sequence of authority and really it does not merit the time that otherwise would be taken that this court should go right through all those cases. *R. v. Tilley* (2) is undoubtedly the most important, most prominent, of the decisions and was a case where ASHWORTH, J., giving the judgment of the Court of Criminal Appeal, of which it happened that I was myself the junior member, used this expression which this court today, no longer the Court of Criminal Appeal but the Court of Appeal, Criminal Division, thinks has been not only misinterpreted to some extent but has been more widely applied and held to be of stricter restrictive effect than really is justified by the words of the court. This was said:

(1) (1869), 11 Cox, C.C. 546.

(2) 125 J.P. 611; [1961] 3 All E.R. 406.

"In the present case there was no evidence, not even questions directed to alleged similarities, and the matter only arose in the course of the summing-up."

That point stresses the importance of what counsel for the Crown said to the court today in his submission, that it may very well be the proper practice where the prosecution does or should anticipate that there will be an issue as to the genuineness of some signature, that the prosecution should tender a witness who is properly expert to give evidence on that matter; in *R. v. Tilley* (1), as in the instant case, the matter only arose long after the trial had begun, at a time when even if the matter were dealt with by rebuttal, almost certainly there would have to be a second trial rather than such a long adjournment as would be required to obtain the expert advice. There was no evidence in *R. v. Tilley* (1), said the judge, and the matter only arose in the course of the summing-up. He went on:

"This court indorses and re-affirms the statement of principle to be found in the judgment of *SALTER, J.*, on behalf of this court in *R. v. Rickard* (2). A jury should not be left unassisted to decide questions of disputed handwriting on their own."

The question arises whether within the proper understanding of those words in the instant case the jury was "left unassisted to decide questions of disputed handwriting". The document had to go before the jury in the instant case since it formed part of the probative material establishing the visit by the man who took away the wallet and the fact that he had entered somebody's name in the register of the bank. The jury was not in the instant case invited to make any comparisons, as the jury had been in *R. v. Tilley* (1). The learned deputy chairman in the instant case did not himself purport to make any comments of any kind about similarities or dissimilarities as had been done by the learned deputy chairman in *R. v. Tilley*. The jury were warned very, very carefully and stringently not to make these comparisons. In the circumstances, it does not seem to this court that the jury in the instant case can be said to have been left to decide questions of disputed handwriting on their own. It is true they were not effectively prevented from doing it. What could possibly have been done effectively to prevent them from making the comparison passes the comprehension of this court. It can hardly be right to suppose that the documents already before them for a legitimate, proper and necessary purpose should have been snatched away from them since that could only have aroused dissatisfaction and grave doubt in their minds as to the fairness of the proceedings which were being conducted before them.

There have been subsequent references; it is right I should say that one of them was a part of a judgment of mine in *R. v. Stannard* (3) which was quite a complicated and heavy appeal. A very subsidiary issue on the appeal was whether or not there had been any impropriety in the manner in which the jury were allowed to look at certain signatures. I attempted then to give what, on looking at it again, I feel was not a very satisfactory paraphrase of the earlier case of *R. v. Tilley* (1). I referred to the undoubtedly correct statement that the "court does not decide that expert evidence in such cases is necessary" and the observations of *BLACKBURN, J.*, in *R. v. Harvey* (4) do not so decide.

(1) 125 J.P. 611; [1961] 3 All E.R. 406.

(2) (1918), 82 J.P. 256.

(3) 128 J.P. 224; [1964] 1 All E.R. 34; [1965] 2 Q.B. 1.

(4) (1869), 11 Cox, C.C. 546.

I referred to the danger involved. Then I said:

"The situation here was quite the obverse of the medal because what defending counsel desired to have from the learned judge was a direction that they should make this comparison..."

It seems to the court that in the instant case the matter was properly dealt with. The fact remains that there is a very real danger where the jury make such comparisons, but as a matter of practical reality all that can be done is to ask them not to make the comparisons themselves and to have vividly in mind the fact that they are not qualified to make comparisons. It is terribly risky for jurors to attempt comparisons of writing unless they have very special training in this particular science. All possible was done, this court thinks, with great care and very fairly by the court in the instant case. It may well be that, despite it, the jury did try to make comparisons. That is really unavoidable and it should be accepted these days that *R. v. Tilley* (1) cannot always be in its literal meaning exactly applied; nevertheless every possible step and regard should be had to what was said by the court in that case, in as much as never should it be deliberately a matter of invitation or exhortation to a jury to look at disputed handwriting. There should be a warning of the dangers; further than that, as a matter of practical reality, it cannot be expected that the court will go. That being the whole burden of this case and there being ample evidence to support this conviction, this court dismisses the appeal against conviction and then turns to sentence, saying about it no more than that it was really a lenient sentence for a carefully contrived and planned crime of this kind, notwithstanding the virtually clean record of this man. He has surrendered to his bail and the appeal is dismissed.

Appeal dismissed.

Solicitors: *E. D. H. MacGreevy; Solicitor, Metropolitan Police.*

T.R.F.B.

(1) 125 J.P. 611; [1961] 3 All E.R. 406.

COURT OF APPEAL (CRIMINAL DIVISION)

(DAVIES, L.J., LYELL AND DONALDSON, J.J.)

February 14, 21, 1969

R. v. PARKER

Criminal Law—Conviction—Two persons jointly charged—Larceny of two articles—Conviction of one defendant of independent larceny of one article—Validity.

When two persons are jointly charged on indictment with an offence, e.g., larceny of two articles, one of those persons cannot be convicted of the theft of one of the articles independently of his co-accused, i.e., the theft of that article otherwise than as part of a joint enterprise.

APPEAL by Ellen Jean Parker against her conviction at Greater London (Middlesex Area) Sessions of stealing one pair of tights, when she was sentenced

by the deputy chairman (K. BRUCE CAMPBELL, Esq., Q.C.) to undergo a period of Borstal training.

J. H. B. Gardner for the appellant.

H. F. Cassel for the Crown.

Cur. adv. vult.

21st February. **DONALDSON, J.**, read this judgment of the court. For the reasons set out hereafter, this court on 14th February allowed the appeal of Ellen Jean Parker against her conviction at Greater London (Middlesex Area) Sessions for the theft of one pair of tights.

Eleanor Overy and the appellant, both of whom were aged 17, were indicted for larceny contrary to s. 2 of the Larceny Act 1916, the particulars being that

"Eleanor Overy and Ellen Jean Parker on the 8th day of July, 1968, in Greater London, did steal two pairs of tights, the property of Tesco Stores, Ltd."

Miss Overy pleaded "guilty" and was placed on probation for two years. The appellant pleaded "not guilty". The basis for the prosecution was that both girls went to the nylon counter in Tesco Stores, Greenford, and Miss Overy was seen to take some tights and conceal them under her cardigan. Both girls left the shop, but were brought back to the manager's office where Miss Overy produced a pair of tights. The appellant also produced a pair of tights from the waistband of her trousers and threw them on the floor in a corner of the office. In the course of his summing-up, the learned deputy chairman said that it had occurred to him and also to counsel that a possible conclusion on the evidence was that there had been no joint enterprise, but rather "two separate pieces of private enterprise". He then directed the jury as a matter of law that if they came to that conclusion they might still find the appellant guilty of the offence. He asked them, if they found the appellant guilty, to bring in a special verdict stating whether they found her guilty of being jointly concerned or whether they found her guilty of independently stealing one pair of tights. The jury found the appellant guilty and, in response to a question by the clerk of the court "Do you find her guilty of stealing two pairs of tights or one pair of tights?" replied "One pair of tights".

Counsel for the appellant submitted that the learned deputy chairman should not have directed the jury that, on a joint indictment for stealing, the appellant could be convicted if she stole independently of her co-accused, that is to say, otherwise than as part of a joint enterprise, and he relied on *R. v. Scaramanga* (1). That case decided, to quote the passage relied on, that

"...except where provided by statute, when two persons are jointly charged with one offence judgment cannot stand against both of them on a finding that an offence has been committed by each independently."

He also submitted that s. 6 (3) of the Criminal Law Act 1967 had no application to the facts of this case. Finally he submitted that it was not apparent whether the jury had found that: (i) the appellant stole one pair of tights independently of her co-accused; or (ii) the two girls jointly stole one pair; or (iii) two pairs were stolen in a joint enterprise, each girl stealing one pair.

Counsel for the Crown agreed that s. 6 (3) of the Criminal Law Act 1967 had no application. The subsection provides that—

"Where, on a person's trial on indictment . . . the jury find him not guilty of the offence specifically charged in the indictment, but the allegations

(1) 127 J.P. 476; [1963] 2 All E.R. 852; [1963] 2 Q.B. 807.

in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

The scope of this subsection was recently considered by this court in *R. v. Woods* (1) and it was said that—

"No court should be encouraged to cast around to see whether somehow or other the words of the indictment can be found to contain by some arguable implication the seeds of some other offence."

The application of this principle to the present case does not arise because the jury failed to find the appellant not guilty of the offence charged in the indictment and the essential prerequisite for the operation of the section is therefore absent. Counsel for the Crown further submitted that *R. v. Scaramanga* (2) had no application because Miss Overy pleaded guilty to stealing jointly with the appellant and accordingly there was no "finding" that an offence had been committed by each independently. Any finding was limited to the fact that the appellant stole independently. The scope of that decision should not, he submitted, be extended.

In our judgment the application of the principle which formed the basis of the decision in *R. v. Scaramanga* (2) does not depend on whether one accused pleaded guilty and there was in consequence no "finding" in relation to that accused in the sense of a verdict by a jury. The principle is wider. It is clear law that if a person is accused of stealing two articles, he can be convicted if it be proved that he stole one only. It is also clear that if two persons are accused of stealing jointly one or other or both may be convicted of that joint stealing. Alternatively, either but not both could be convicted of stealing independently, or each may be convicted of stealing jointly. In each of these cases the essential feature is that one offence is charged and one offence is proved. *R. v. Scaramanga* (2) and the other decisions therein cited all proceed on the basis that in the absence of statutory provisions, such as s. 44 (5) of the Larceny Act 1916, if only one offence is charged it is not open to the court or jury to find two offences proved. In the present case the verdict of the jury is at least capable of the interpretation that a different offence was committed by the appellant from that to which Miss Overy pleaded guilty. Only one offence was charged and it was not open to the jury to find that a second offence was committed.

We have considered whether the proviso to s. 2 (1) of the Criminal Appeal Act 1968, should be applied. A similar problem arose in *R. v. Scaramanga* (2) where, as here, there had been a technical error and no miscarriage of justice had occurred. LORD PARKER, C.J., giving the judgment of the Court of Criminal Appeal said:

"No doubt one of the objects of the proviso [to s. 4 (1) of the Criminal Appeal Act 1907] was to prevent the quashing of a conviction on a mere technicality provided, . . . that no embarrassment or prejudice to the defendant was caused thereby . . . We, however, know of no case in which the court has applied the proviso for the purpose of, in effect, substituting another verdict. The only power in this court to substitute a verdict is that contained in s. 5 (2) of the Act of 1907, which power is limited to a case in which the jury could 'on the indictment' have found the defendant guilty of some other offence."

(1) Ante p. 51; [1968] 3 All E.R. 709.

(2) 127 J.P. 476; [1963] 2 All E.R. 852; [1963] 2 Q.B. 807.

In the context of the summing-up we consider that the clerk of the court, in asking the jury whether they found the appellant guilty of stealing two pairs of tights or one pair of tights, must be taken to have been asking whether they found that she had stolen jointly or independently and that the answer indicated an independent theft. The situation is thus the same as in *R. v. Scaramanga* (1). The wording of the proviso to s. 2 (1) of the Act of 1968 is the same as that of s. 4 (1) of the Act of 1907 save that it refers to "no miscarriage of justice" instead of "no substantial miscarriage of justice", an amendment first made by the Criminal Appeal Act 1966. The power to substitute a conviction of an alternative offence is now contained in s. 3 (1) of the Act of 1968, the wording of which differs from that of s. 5 (2) of the Act of 1907, but the power is still limited to cases in which "the jury could on the indictment have found him guilty of some other offence". In the circumstances this court felt constrained, for the reasons and with the same reluctance as was expressed by LORD PARKER, C.J., in *R. v. Scaramanga* (1) to quash the appellant's conviction.

Conviction quashed.

Solicitors: Registrar of Criminal Appeals; Solicitor Metropolitan Police.

T.R.F.B.

(1) 127 J.P. 476; [1963] 2 All E.R. 852; [1963] 2 Q.B. 807.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., BLAIN AND DONALDSON, JJ.)

February 26, 1969

ALDERSON *v.* BOOTH

Arrest without warrant—Essential elements—Clear words to be used.

To constitute a valid arrest without warrant, there need not be any seizing or touching of the person whom it is intended to arrest, but clear words should be used by the arresting officer to bring to the notice of the arrested person that he is under compulsion to accompany the officer, and the simplest thing is for the officer to say: "I arrest you." It is particularly desirable that clear words should be used in circumstances in which, as the result of drink or drugs, the understanding of the arrested person may be dulled.

CASE STATED by Saddleworth, West Riding of Yorkshire, justices.

On 23rd May 1968 an information was preferred by the appellant, Jack Alderson, a police officer, against the respondent, Geoffrey Booth, charging that he on 26th April 1968 in Chew Valley Road, Greenfield, at the junction with Ladhill Lane did drive a motor car on a road having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test, exceeded the prescribed limit at the time he provided the specimen, contrary to s. 1 (1) of the Road Safety Act 1967.

On the hearing of the information at Uppermill Magistrates' Court on June 26, 1968, the following facts were found. On 26th April 1968, the respondent was the driver of a motor car in Chew Valley Road, Greenfield, when he was involved in a road accident with another vehicle; shortly after the accident had occurred, a police constable in uniform visited the scene and there saw and spoke to the respondent; the constable had reasonable cause to believe that the

respondent was the driver of a motor vehicle involved in an accident and also had reasonable cause to suspect him of having alcohol in his body; acting under the authority of s. 2 (1) and s. 2 (2) of the Road Safety Act 1967 the constable required the respondent to provide a specimen of breath for a breath test; making use of a device of a type approved for the purpose of such a test by the Secretary of State, the respondent duly provided a specimen of breath and the result of the test was positive, indicating that the proportion of alcohol in the blood exceeded the prescribed limit; the constable informed the respondent of the result of the test and said, "I shall have to ask you to come to the police station for further tests"; the respondent accompanied the constable to a police station where the respondent was given an opportunity to provide a specimen of breath for a breath test there; making use of the approved device referred to, the respondent provided a specimen of breath and the result was again positive, indicating that the proportion of alcohol in the blood exceeded the prescribed limit: the constable then required the respondent to provide a specimen for a laboratory test in accordance with the provisions of s. 3 (1) of the Road Safety Act 1967; the respondent agreed to give a sample of blood which was duly taken by a doctor; the respondent was then admitted to bail by a police inspector pursuant to s. 38 (2) of the Magistrates' Courts Act 1952 to appear at Uppermill police station on 24th May 1968 and the respondent was then taken to his home by the constable; on analysis, the sample of blood provided by the respondent was found to contain not less than 203 milligrammes of alcohol in 100 millilitres of blood, which exceeded the prescribed limit as defined in s. 7 (1) of the Road Safety Act 1967.

On behalf of the respondent it was contended that he had not been "arrested" pursuant to the power contained in s. 2 (4) of the Road Safety Act 1967 and that the respondent had voluntarily accompanied the constable to a police station for further tests and, in these circumstances, the court could not act on the subsequent evidence as to the breath tests and the analysis of the blood sample. On behalf of the appellant it was contended that the respondent had been duly arrested and that the offence under s. 1 (1) of the Road Safety Act 1967, as set out in the said information, was made out.

The justices were of opinion that when the respondent accompanied the constable to the police station it was not made clear to him either physically or by word of mouth that he was under compulsion. They considered that compulsion was a necessary element of arrest and they, therefore, did not regard the respondent as a person who had been arrested. As a consequence they did not consider that the blood sample had been provided under s. 3 of the Road Safety Act 1967, and they accordingly dismissed the information.

The prosecutor appealed.

R. A. R. Stroyan for the appellant.

Quintin Hogg, Q.C. and *H. K. Goddard* for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices of the peace for the West Riding of the county of York sitting at Uppermill, who dismissed an information preferred by the appellant against the respondent for an offence against s. 1 (1) of the Road Safety Act 1967. The only relevant facts so far as this case is concerned are that a police officer came on a road accident involving the driver of a motor car who was the respondent; he asked, as he was entitled to under s. 2 (1) of the Road Safety Act 1967, for the respondent to provide a specimen of breath for a breath test. The respondent did, and it proved positive. Thereupon the finding is that the

constable informed the respondent of the result of the test and said "I shall have to ask you to come to the police station for further tests". The respondent accompanied the constable to a police station, where the respondent was given an opportunity to provide a specimen of breath for a breath test there, but that in turn proved positive; he was then asked for a sample of blood which from analysis showed that his blood contained no less than 203 milligrammes of alcohol in 100 millilitres of blood, against the prescribed limit of 80 milligrammes.

It is quite clear, and the justices recognise the fact, that in order to prove this offence it is necessary to prove that a specimen of blood has been taken in accordance with s. 3, and when one looks at s. 3 one finds that a specimen of blood can only be taken if, amongst other things, a man has been lawfully arrested. The question arises at once: had the respondent been arrested after the first breath test under s. 2 (4), which provides that:

"If it appears to a constable in consequence of a breath test carried out by him on any person under subsection (1) or (2) of this section that the device by means of which the test is carried out indicates that the proportion of alcohol in that person's blood exceeds the prescribed limit, the constable may arrest that person without warrant except while that person is at a hospital as a patient."

Accordingly, the narrow point here was whether the justices were right in holding, as they did, that there never had been an arrest. In their opinion, which is clearly partly opinion and partly of finding of fact, they say this:

"We were of opinion that when the respondent accompanied the constable to the police station it was not made clear to him either physically or by word of mouth that he was under compulsion. We consider that compulsion is a necessary element of arrest and we therefore did not regard the respondent as a person who had been arrested."

There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided of course that the accused submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which, in the circumstances of the case, were calculated to bring to the accused's notice, and did bring to the accused's notice, that he was under compulsion and thereafter he submitted to that compulsion.

Looked at in that way, I for my part have little doubt that just looking at the words used here "I shall have to ask you to come to the police station for further tests" they were in their context words of command which one would think would bring home to an accused that he was under compulsion. But the justices here had the evidence not only of the police officer but of the respondent, and they were not satisfied, having heard him, that it had been brought home unequivocally to him that he was under compulsion. I confess it surprised me that he was believed, but believed he was when he said or conveyed that he was not going to the police station because he thought he was under compulsion, but was going purely voluntarily. It seems to me that this is so much a question of fact for the justices that, surprising as this decision is, I feel that this court cannot interfere.

I would only say this, that if what I have said is correct in law, it is advisable that police officers should use some very clear words to bring home to a person

that he is under compulsion. It certainly must not be left in the state that an accused can go into the witness box and merely say "I did not think I was under compulsion". If difficulties for the future are to be avoided, it seems to me that by far and away the simplest thing is for a police officer to say "I arrest you". If then the accused goes to the police station after hearing those words, it seems to me that he simply could not be believed if he thereafter said "I did not think there was any compulsion, I was only going voluntarily". Accordingly, I would dismiss this appeal.

BLAIN, J.: I agree. I would add that I have considerable sympathy with any police officer who believes that he has arrested a person with good reason, and finds that he has failed to do so through using words selected with a laudable desire to perform his duties with the maximum of courtesy. That, however, is of far less importance than the vital right of the subject to know when he is compellable and when he is free. I agree that this court cannot interfere.

DONALDSON, J.: I, too, agree. I agree in particular that courtesy is to be encouraged and that police officers in these circumstances are faced with a difficult decision to make. But it is particularly desirable that clear words should be used in circumstances in which, as a result of the effect of drink or drugs, a person's understanding may be dulled.

Appeal dismissed.

Solicitors: *Cummings, Marchant & Ashton*, for *M. D. Shaffner*, Wakefield; *Philip Ross, Elliston & Co.*, for *Elliott & Buckley*, Manchester.

T.R.F.B.

CHANCERY DIVISION

(GOFF, J.)

January 13, 14, 15, 16, 17, 20, 30, February 26, 1969

ATTORNEY-GENERAL v. BEYNON

Highway—Boundary—Road running between fences—Presumption—Rebuttal.

The L. council, as highway authority, had vested in it a road which had been an ancient coal road. The metalled portion in the material stretch ran east to west and was about twenty feet wide. On Apr. 21, 1938, the defendant bought a house on the north side of the road. Opposite this house, on the south side of the road, was a grass verge, which ran westwards about 200 feet, was some 40 feet wide, and was bounded on the south side by an ancient hedge with a ditch in front of it on the road side. The council claimed that the verge was part of the highway. The verge did not belong to the adjoining owner on the south and no evidence was adduced to show a paper title of any kind. The court found that no act of independent ownership or right of user had been proved by either side. The council relied on a presumption that, as the road ran between fences on either side, the whole space between was highway. The defendant conceded that, to a depth of ten feet, the part of the verge adjoining the metalled part of the road was part of the highway, but denied the claim to the remainder. On argument as to the precise nature and effect of the presumption relied on by the council,

HELD: the mere fact that a road ran between fences or hedges did not per se give rise to any presumption that the right of way, and therefore, the highway, extended to the whole space between the fences; first it must be decided as a preliminary question whether those fences had been put up by reference to the highway

that was to separate the adjoining land from the highway or for some other reason; that question was to be decided in the sense that the fences did mark the limit of the highway unless there was something in the condition of the road or the circumstances to the contrary; thereafter, a rebuttable presumption of law arose which supplied any lack of evidence of dedication in fact or inferred from user that the public right of passage, and, therefore, the highway, extended to the whole space between the fences and was not confined to such part as might have been made up; in the present case, there being no evidence to the contrary, the highway extended to the whole space between fences and the verge was part of the highway.

PER CURIAM: The fact that, since 1960 or even before, the defendant had been rated in respect of his occupation of the verge was irrelevant [to the issue of ownership], both because the highway authority was not the rating authority, and because the latter was concerned only with occupation and not whether it was lawful.

ACTION by the Attorney-General on the relation of Leicester County Council, the highway authority, against the defendant, Joseph Gwynfor Beynon, the owner of a house in Leicester Lane, a road leading from Desford to Enderby, claiming a declaration that a roadside strip of greensward approximately 40 feet wide opposite his house on the other side of the roadway was part of the highway.

Douglas Frank, Q.C., and K. H. T. Schiemann for the Attorney-General.
Jeremiah Harman, Q.C., and O. R. W. W. Lodge for the defendant.

Cur. adv. vult.

26th February. GOFF, J., read the following judgment: In this case, Her Majesty's Attorney-General sues on the relation of the Leicester County Council, who are the highway authority and as such have vested in them the road called Leicester Lane leading from Desford to Enderby. It is an ancient coal road and the metalled portion in the material stretch is about 20 feet wide. The defendant is the owner of a property called Acacia Lodge, which he bought on 21st April 1938, and which lies on the north side of the road.

The action concerns a roadside strip of greensward, which I will call "the verge", on the south side of the road beginning approximately opposite the defendant's property and running westwards for a little under 200 feet, part of a larger strip which I will call "the strip" and which is in all some 570 feet as I scale the measurements from the plan. The council claim that the verge is part of the highway. The strip is of a fairly uniform depth of approximately 40 feet, and is bounded at the rear or southern boundary by an ancient hedge with a ditch in front of it, that is to say on the roadward side. The verge does not belong to the adjoining owner to the south and no evidence was adduced to show a paper title of any kind, although it is possible that the defendant may have acquired a statutory title. This hedge stands on a small bank. One of the witnesses, a Mr. Deacon who lives at a house called Far Forest just to the west of the strip, gave this bank as being some two or three feet high, but the defendant said that there was not much of a bank and along the western end of the verge he said that there was little or no bank. This evidence does not seem to me to suggest a prominent natural feature which might account for the hedge being on that line. More probably, the bank was made by digging out the ditch. The strip is clearly level with the road.

The ditch serves to drain the land lying to the south of the road where there is a pond. It was established by the evidence of Mr. Deacon that the overflow drains from this pond down the side of his property to the ditch and then along the front of the strip to a place where it meets a ditch coming from the opposite direction, that is to say the east end and then the combined flow turns north-

wards across the road into the defendant's property. In former days this part was an open ditch or water course which he called "the brook" and it was very boggy in the hollow where the brook ran. Cows used to drink there. In Mr. Deacon's early days, until he was about 13, there were cattle which he tended there for his father when they lived at Caldecott Croft, a property on the north side of the road next to the defendant's house, and apparently for one other farmer, though it did not appear where his farm was. Mr. Deacon further said that the defendant, in common with other farmers, let his cattle on to the road and they went to drink at the brook.

I think that this brook or stream, or whatever it was at one time, flowed over the road but that it was culverted under the road sometime, I think, after Mr. Deacon first knew the property. This culvert, however, began in the strip very near the roadside and cattle could still drink there. The defendant says that, when he bought his property in 1938, he was told by his vendor, who owned the land on the south, that he, the defendant, could water his cattle at the brook in dry weather. It was not shown, however, that the vendor owned the strip or verge or had any rights over them. The defendant extended this culvert further into his own land because the outlet was too boggy, but nothing turns on that. Then, in 1950, when the council were making up a footpath they extended the culvert nearly right across the strip to make it safe for pedestrians to walk there. Also, there were and are two drainage grips cut from the road into the strip between the western end and the culvert. These do not reach the ditch but serve to drain the road into it by percolation. Further east opposite Caldecott Croft there are and have been for as long as the defendant can remember one or two grips reaching to the ditch in that place.

The hedges beyond the western end of the strip and the eastern end of the verge are much nearer the metalled road at distances of as little as six feet to ten feet. At each of these ends the rear hedge comes forward to meet this more advanced frontage line. At the south-east corner of the rear hedge there is a large oak tree. The strip is crossed by an access way at the west end of the verge to a property on the south side called Forest Field. This is a modern way and was made after the defendant acquired his property in 1938. A little to the east of this way there is a smaller tree. At the extreme western end of the strip there is another access way, and this has existed for as long as any of the witnesses could remember. This was clearly the original way into the whole of what was a large field lying immediately to the south of the strip and the new way was made when a house called Forest Field was built.

The land immediately behind the verge has no convenient front access. It is possible to get there through the adjoining property called Laburnum Grove and thence to a path at the rear, but that is really a footpath and it is difficult to manoeuvre thence into the field. However, the evidence shows that access was originally gained from the way in at the western end of the strip as the field behind the verge was not separated from the whole large field until 1941. Then, or soon afterwards, a front gate was made leading on to the verge but no access way across it. The property called Laburnum Grove immediately to the east of the verge has a second hedge behind the more forward one to which I have referred and a little nearer the road than the hedge at the rear of the verge, but it is clear that this was planted some time between 1886 and 1903 as it is not shown on the ordnance survey map for the former year but is on that for the latter and nothing turns on this second hedge.

Considerably further along the road to the west, the frontage reverts to approximately the line of the rear hedge of the strip; and it is clear from the tithe

map of 1847 that there had been at some time before that date a roadside margin beginning at a point a little to the east of Laburnum Grove and widening on a diagonal line to the depth of the strip and then continuing in a more or less straight line past Laburnum Grove and the rear of the strip and on for a considerable distance to a point where the road turns sharply north east. That tithe map itself shows two plots numbered respectively 121 and 128 and described in the tithe award as intakes having the modern frontage to the road and as their rear boundary the rear line of the margin I have just described, but how the rear of those two intakes was then fenced off does not appear. It is clear, therefore, that the hedge at the rear of the strip was an ancient boundary of some kind and that it had been advanced on either side.

Two closes beyond the point where the road turns north east there is a peculiar shape referred to at the trial as a rhomboid which is coloured in the same way as the rest of the untitheable land representing road margins. This suggests that the wide margin may have continued past those two closes to the rhomboid, but that is little more than conjecture. The rhomboid itself was enclosed before the ordnance survey of 1886. To the west of intake 121 the tithe map appears to show a wide verge on the north side of the road also and it shows a number of intakes on that side of the road as well, all of which would suggest that originally there was a wide margin on the north as well as on the south from about the same point as it commences on the south side right up to the point where the road turns to the north east, but it has now largely disappeared and opposite the strip it is of the order of six or seven feet and no more.

The turnpike map of 1788 was also given in evidence. This appeared to be drawn to scale laterally along the length of the road. If that scale be applied to measure the width of the road, it would produce the absurd result of 70 feet for the road alone with margins either side of 70 feet. I cannot regard the width of the road and margins as being true to scale, but it does support the indications from the tithe map of a road with a wide margin on either side. Also, it is to be observed in passing that, by s. 26 of the Turnpike Act 1788, the trustees were authorised but not required to widen the road to 40 feet which clearly was not done along any material part. It was also provided by that section that the trustees might alter the route and the adjoining owners might purchase the old site, but that, if they did not, then by s. 29 they were to fence off their land from the site of the old road. There have been further intakes since 1847, and comparison of the tithe map and the latest ordnance survey of 1961 shows that, from and including the rhomboid past the strip to the White Horse Inn which lies south of Laburnum Grove a distance of just under one mile, the later enclosures amount in all to 0.6 acres plus very small pieces which were not such as could be calculated.

The council tried to establish as an act of ownership that they had regularly mowed the grass on the verge right back to the ditch, but I am satisfied that they did no more than keep the edge tidy and cut the near side. At first a roadman cut the edge with his spade and turned it back on to the grass of the verge. Later, the council cut a swathe about four feet wide and still later a second swathe of similar width from the footpath. All the rest was originally left uncultivated, dying down each year, and afterwards was cut in part by a man who had poultry houses in the southern field and in part by the defendant himself. It was established on behalf of the defendant that, between the wars, Mr. Basford, the previous owner of the defendant's property, kept an obsolete furniture van on the verge for about three years and also a quantity of farming equipment. I do not think that this can have been very considerable for most of the time as the

witness Mr. Deacon said that it was kept under the oak tree being, as I find, the large one in the corner. There is evidence, however, from the defendant that he went to look at Acacia Lodge twice before purchasing it and that he saw on the strip or verge horse-drawn farm vehicles which he identified as a hay rack, a turner and a four-wheel dray. In addition, Mr. Deacon said that a contractor who owned threshing equipment would work in the neighbourhood for about a month and that he was accustomed to leave his machine on the strip overnight. That, however, is common in country districts. If Mr. Basford was owner or tenant of the southern field his title was not proved, but there was evidence that he used it for his trotting horses, I suppose for grazing. When the defendant acquired his property, there was a large clamp of manure under the oak tree and the remains of some kind of farm implement in front which he had to remove to get at the manure which he carted away.

The defendant had a large trailer horse box which he used for taking his cattle to market, and this he at once began to keep on the verge together with his own private car. He soon commenced buying and selling cars, at first in a small way as a hobby, and these, too, he kept on the verge. There were Austin Cambridge cars and he says that there were only one or two, which is confirmed by the witness, Mr. Stableford, who says there were only one or two cars or farming implements as late as 1953. During the war the defendant dealt in farm vehicles, and he kept these also and others of his own farm vehicles on the verge. In later years, which I place as after 1953, the defendant developed his car dealing business and since then he has regularly parked on the verge a number of cars and farm vehicles which he has for sale. The photographs show some five cars, three hay bailers and two lorries.

The council complain that, in this way the defendant is and has been obstructing the highway, and it is conceded that they are right in that if the verge is part of the highway, which is denied save a width of some ten feet immediately adjoining the metalled way where no cars or vehicles have been or are kept. The parking is confined to the verge and does not extend to the rest of the strip.

When the defendant purchased Acacia Lodge, a portion of the verge was already covered with some kind of grit or stone which may have been the residue of dumps placed there by the council when making up the road. There was at all events no evidence how they came to be there. Afterwards the defendant put down gravel in this area. Apart from this and apart from the fact that parts are more rough than others, the whole strip is similar in appearance. There is a large clump of willow and other smaller growths but no appreciable obstruction to public user. It is particularly significant that there is no natural or other division between the metalled track and the ditch, and nothing to distinguish the ten feet or so of the verge which the defendant admits to be highway from the rest. This counsel for the defendant distinguishes by a notional line drawn between the two advanced hedges on either side of the strip.

There was no evidence of any use of the strip by the public for passage before 1930 as the traffic on the road was light and the people walked in the road itself, but thereafter they began to walk on the verge near the edge. In 1945, the council widened the road by some four or five feet, and this I find as a fact was carried out on the southern side. In 1950, they made up a footpath from the White Horse Inn which lies as I have said east of the strip to Stud Farm to the west. It seems they did not make it up where the gravel was because it was unnecessary, but subject to this they carried it right across the strip but wholly in front of the notional line which I have mentioned. There was a dispute on the evidence as to its width. According to the council's directions it should have been four feet

six inches, but I doubt whether it was ever much more than three feet six inches wide if that. This path quickly gets overgrown and, when required, the council have sided it out. The council have also cut the willows on complaint made by the parish council.

No other acts of ownership were proved on either side, and it was clear that the council did not clean out the ditch. However, the presumption would be that the ditch was not part of the highway (see *Hanacombe v. Bedfordshire County Council* (1)) and this would not prevent the fence to fence presumption from applying up to the ditch. The council rely on what may be called the fence to fence presumption which to quote the hypothetical direction given by MARTIN, B., in *R. v. United Kingdom Electric Telegraph Co., Ltd.* (2), may be stated in these terms:

"In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire of it, as the highway, and are not confined to the path which may be metalled or kept in order for the more convenient use of carriages and foot passengers".

There was, however, before me a long argument as to the precise nature and effect of this presumption and the many cases on the subject were exhaustively canvassed.

It is clear that the mere fact that a road runs between fences, which of course includes hedges, does not *per se* give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway that is to separate the adjoining closes from the highway or for some other reason. When that has been decided, then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user that the public right of passage, and, therefore, the highway, extends to the whole space between the fences and is not confined to such part as may have been made up.

It seems clear to me, however, as the principle has developed that one is to decide that preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or the circumstances to the contrary. This was the basis of the decision of WARRINGTON, J., in *Offin v. Rochford Rural District Council* (3), where he said:

"It seems to me that the result both of that case [that was *Neeld v. Hendon Urban District Council* (4)] and of *R. v. United Kingdom Electric Telegraph Co., Ltd.* (2) is this—that the mere existence of fences on either side of a highway is not enough to raise the presumption. You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway, and, therefore, to be the boundaries of the highway, and, further, I think that, having regard to the judgment of VAUGHAN WILLIAMS, L.J., if you find a fence by the side of the highway, then *prima facie* that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose".

(1) 102 J.P. 443; [1938] 3 All E.R. 647; [1938] Ch. 944.

(2) (1862), 26 J.P. 390.

(3) 70 J.P. 97; [1906] 1 Ch. 342.

(4) (1899), 63 J.P. 724.

This passage I confess puzzled me at first and appeared indeed to be self-contradictory, but, carefully analysed, I think that its meaning is succinct and clear. WARRINGTON, J., said "You have to find whether those fences are *prima facie* to be taken to have been made in reference to the highway", because that preliminary finding may be rebutted by evidence of acts of ownership inconsistent with that conclusion, but then he says further "*prima facie* that fence is the boundary of the highway, unless you can find some reason for supposing that it was put up for a different purpose." This was accepted by SINGLETON, J., as a concise summary of the law in *Hinds and Diplock v. Breconshire County Council* (1), and I, too, respectfully adopt it. *Countess of Belmore v. Kent County Council* (2), on which the defendant placed great reliance, is distinguishable because in that case there were clear acts of ownership inconsistent with the public right to rebut the presumption, notably making access ways raised some three or four feet above the level of the ground. *Neeld v. Hendon Urban District Council* (3) is also distinguishable. I doubt whether the fact that it dealt with a highway over manorial waste would be sufficient (see *Evelyn v. Mirrielees* (4)), but again there were adverse acts of ownership and the local authority surveyor had actually assisted the private owner in the erection of his fence.

I have now to apply these principles to the facts of the present case, and I start with this that, in my judgment, there is nothing in the terrain to show the contrary of the *prima facie* rule, unless it be in the width of the verge or in the intakes. I do not consider the clump of willows or the brook as sufficient for this purpose. So far as concerns the bank, as I have said I do not regard this as a natural feature explaining the rear hedge being sited there, and I would refer to these words in the judgment of KEREWICH, J., in *Locke-King v. Woking Urban District Council* (5):

"No one can tell by whom, when, and under what circumstances they were made; but they have been made, and made according to the ordinary rule, that the incloser goes to the extremity of his land, or, as one may say in this case, the extremity of that which he determines to keep for himself, and digs a ditch and throws the soil from the ditch backwards on to his own land, that is to say, on to the land he intends to keep for himself, so as to form the hedge."

The depth of the verge is, however, considerable, being of an order equal to the full width to which the turnpike trustees were authorised to make up the road, but I cannot consider it so extravagant as to exclude the *prima facie* rule, and in *Offin's* case (6) itself the area was very large, being 900 square yards and being triangular in shape its depth at the apex was 90 feet.

The intakes do not, in my view, exclude the rule merely because they produce irregularity (see *Locke-King's* case (5)), but do they suggest, and, if so, sufficiently, that the rear line of hedge was not put up with reference to the highway? If the council are right, of course the intakes were unlawful encroachments on the highway, but such things are by no means unknown, particularly where they have occurred in earlier times when the public right was not so vigilantly guarded. Here, of course, there have been more modern intakes, but not to a dramatic extent.

(1) [1938] 4 All E.R. 24.

(2) 65 J.P. 456; [1901] 1 Ch. 873.

(3) (1899), 63 J.P. 724.

(4) (1900), 17 T.L.R. 152.

(5) (1897), 62 J.P. 167.

(6) 70 J.P. 97; [1906] 1 Ch. 342.

Counsel for the defendant argues, however, that, rather than reach that conclusion, I should infer that these intakes were into manorial waste. As I have said, having regard to *Evelyn's* case (1), I am not sure that this would place him in any better plight. Apart from this, the intakes would still be unlawful in the absence of an ancient custom authorising enclosure with or without the consent of the lord of the manor, and none was shown. There seems to me, however, to be a very serious difficulty in the way of this theory. In support of it, counsel for the defendant says that this area was all part of the Forest of Leicester, as indeed it was, and within the Honour of Leicester and manor of Desford. Reference to the map at the back of *FOX AND RUSSELL ON LEICESTER FOREST* shows that this may well be right. However, it is clear from the order of the Court of Exchequer in 1628 confirming the agreement for de-afforestation and allotment that the rights of the commoners in the Manor of Desford were bought out by allotting them parcels of the land in severalty. Moreover, great landowners interested in the forest gave up to the Crown substantial parts of their holdings to rid themselves from His Majesty's right of deer in the rest. It seems highly improbable, therefore, that the agreement would have provided for strips along the highway to remain unallotted waste of the manor.

That leaves the possibility that this wide margin was left in order to avoid liability *ratione clausurae*. It is clear that such liability would not in fact have arisen unless the public were actually using the right of deviation (see *R. v. Ramsden* (2)), and there appears to be some conflict of judicial opinion whether leaving a space as a mere precaution would not in itself amount to dedication of that space. *CHANNELL, J.*, clearly thought it would (see *Neeld's* case (3)), but *LORD RUSSELL, C.J.*, doubted that. However, for all I know there may have been an ancient right actually exercised in 1628 and in any case I do not think that I could exclude the *prima facie* rule that the back hedge was made with reference to the highway on what is only a supposed explanation. I am left with no satisfactory explanation why the hedge was placed where it was, and, therefore, must, as it seems to me, adopt the *prima facie* view.

I turn, then, to the alleged acts of ownership. The dumping of an obsolete furniture van, the heap of manure and the overnight parking of the threshing equipment I dismiss as inadequate: see *Offin's* case (4). I also regard the user of the strip as a means of access to the highway as not really of material assistance either way. A more serious question arises from the evidence that Mr. Basford kept farming equipment on the strip or verge more or less regularly perhaps, though the evidence was not very specific, and from the continued user by the defendant, although the evidence was that he did not do much till 1953 and the council first began to challenge his right in 1960 or 1961. However, it was not shown that Mr. Basford was the owner or tenant of the strip or verge or even of the fields to the south, and the defendant certainly never has been. This seems to me greatly to detract from the value of these acts. These were not acts of ownership by a person claiming title to the verge, but the conduct of strangers taking advantage of this convenient strip of land. The same objection of course applies to the defendant's evidence that he used to cut the grass and use it for his bull.

(1) (1900), 17 T.L.R. 152.

(2) (1858), 23 J.P. 196.

(3) (1899), 63 J.P. 724.

(4) 70 J.P. 97; [1906] 1 Ch. 342.



Against this, although the council have failed to prove any acts of public right over the strip other than its edge, they have clearly shown that part of the verge was included in the highway since they widened the road on that side without paying compensation, and afterwards made up a footpath. The defendant was forced to concede that some part of the verge was public highway, and he could show no differentiation or boundary between that which was and that which was not highway other than a notional line. To draw this line is an attractive temptation but not in my view justified. In *Copestake v. West Sussex County Council* (1), PARKER, J., divided the margin in question into three sections and considered each on its own merits. In the centre section he held that there was sufficient evidence of user over the whole depth but he intimated that he would probably have applied the presumption notwithstanding the fences on either side had been advanced. True in that case the margin was narrow, but that is another point. The significant feature is the division of the problem into three sections. This also bears on another point much argued for the defendant that, if the council be right, they will be able to throw down the forward hedges and recover the intakes without compensation. I am not at all satisfied that that is so. This judgment will not be directly binding on the owners of the intakes because they are not parties to the action, and *Copestake's* case (1) shows that the presumption has to be applied according to the facts as they are at the time of the action, and in the northern and southern sections PARKER, J., would not go behind the comparatively modern fences. A fortiori where the point arises in separate actions against different parties.

Finally, the defendant relied on the fact that, since 1960 or even before, he had been rated in respect of his occupation of the verge. This, however, appears to me to be irrelevant, both because the highway authority is not the rating authority, and because the latter is concerned only with occupation and not whether it is lawful.

As I have said, it is conceded that what the defendant is doing is an actionable obstruction of the highway if such the verge be, and for the reasons given I find that it is. Accordingly, the action succeeds and the council are entitled to the relief claimed.

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co.*, for John A. Chatterton, Leicester;
James & Charles Dodd for Josiah Hincks, Son & Bullough, Leicester.

R.D.H.O.

(1) 75 J.P. 465; [1911] 2 Ch. 331.

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COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS AND FENTON ATKINSON, L.J.J. AND CAULFIELD, J.)

March 6, 11, 1969

R. v. JACKSON. R. v. HART

Road Traffic—Driving with blood-alcohol concentration above prescribed limit—Disqualification—Special reasons—Driving ability not impaired—Defendant a cripple dependent on invalid carriage—Unusual condition of liver unknown to defendant—Reasons peculiar to offender and not to offence—Road Traffic Act, 1962 (10 & 11 Eliz. 2 c. 59), s. 5 (1)—Road Safety Act, 1967 (c. 30), s. 1 (1), s. 3 (3) (a), s. 5 (2) (a).

On conviction of an offence under s. 1 (1) or s. 3 (3) (a) of the Road Safety Act, 1967, none of the following facts can amount to a special reason for not imposing mandatory disqualification under s. 5 (1) of the Road Traffic Act, 1962, as applied by s. 5 (2) (a) of the Road Safety Act, 1967—(i) the fact that the driving ability of the defendant was not impaired by drink; (ii) the fact that the defendant is a cripple dependent on an invalid carriage and under the necessity of securing other transport if this is not available to him; (iii) the fact that the defendant suffers from an idiosyncratic state of the liver which was unknown to him, but which had the effect, when combined with his blood pressure, of causing the retention of alcohol in the blood to be longer than usual to some unspecified extent and degree.

APPEALS against sentence.

R. v. Jackson.

On 16th August 1968, the appellant, Dennis James Jackson, pleaded guilty at South East London Quarter Sessions to driving a motor vehicle when the proportion of alcohol in his blood exceeded the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967. He was fined £40, was sentenced to two months' imprisonment in default of payment within seven days, and was disqualified for holding a driving licence for 12 months.

Margaret Puxon for the appellant.*Ann Curnow* for the Crown.*R. v. Hart.*

On 17th June 1968, the appellant Stanley Hart pleaded guilty at Inner London Sessions to failing to supply a specimen for a laboratory test, contrary to s. 3 (3) (a) of the Road Safety Act 1967. He was fined 1s. by the deputy chairman (J. C. B. W. LEONARD, Esq.) and disqualified for holding a driving licence for three years. He appealed against the sentence of disqualification on the ground that there were special reasons for not disqualifying him.

D. A. Paiba for the appellant.*Ann Curnow* for the Crown.

SACHS, L.J., delivered the judgment of the court: These two appeals, one by the appellant Jackson and the other by the appellant Hart, were listed consecutively because they raised parallel points as to what constitute "special reasons" under s. 5 (1) of the Road Traffic Act 1962 in relation to certain offences recently created by Part I of the Road Safety Act 1967. Both cases having been fully and helpfully argued by counsel, it is accordingly convenient to deal with them both in a single judgment.

It is, perhaps, as well first to read the relevant part of the above-cited s. 5 (1):

"Where a person is convicted of an offence specified in Part I of the First Schedule to this Act the court shall order him to be disqualified for such

period not less than twelve months as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified."

Part I of Sch. 1 to the 1962 Act sets out a number of offences, and to those offences there were in 1967 added the two which are now under the consideration of this court.

Both appellants pleaded guilty to offences against provisions of the 1967 Act. The appellant Jackson at South East London Quarter Sessions pleaded to an offence under the provisions of s. 1 (1), by which:

"If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen . . ."

he is guilty of an offence. The offence of the appellant Jackson was having 118 milligrammes of alcohol per 100 millilitres of blood, that being in excess of the prescribed limit of 80 milligrammes.

The appellant Hart pleaded guilty at Inner London Sessions to an offence under s. 3 (3) of the 1967 Act, of which the relevant extract provides:

"A person who, without reasonable excuse, fails to provide a specimen [of blood] for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence . . ."

The appellant Hart had, in fact, refused to give such a specimen in circumstances which were without doubt unreasonable and to which this court will in due course further refer.

In both cases it was held at quarter sessions that no special reason had been established which would enable the court to impose a lesser term of disqualification than the relevant Acts provided. In both cases reluctance was expressed by the court at having come to such a decision. In both cases a lesser fine was imposed than would have been the case if the court had been free to disqualify the appellants for some lesser period, or not to disqualify at all. Hence these appeals seeking to establish that the respective courts were each wrong in law in holding that there was no special reason. It should be added that, so far as the appellant Jackson was concerned, the fine was £40 and he was disqualified for 12 months; and that, so far as the appellant Hart was concerned, the fine was 1s. and he was disqualified for three years.

Taking first the facts as regards the appellant Jackson, he is aged 41, and is a civil engineer. He was arraigned on two counts, the first under s. 6 (1) of the Road Traffic Act 1960 for driving whilst unfit to drive owing to drink consumed. To that count he pleaded not guilty, and that plea was accepted in the sense that it was not further proceeded with. The second count was under s. 1 (1) of the 1967 Act for the offence already stated to which he pleaded guilty. His only previous motoring offences were in December 1967, when on the same day he was twice fined for exceeding the speed limit.

The facts put before sessions on behalf of the Crown were as follows. On 30th April 1968, a little after midnight, a police car followed the appellant Jackson's Jaguar. It was observed to be exceeding the 40 miles per hour speed limit, and its headlights were full on although the road was quite well lit; the driving was erratic, but the road was deserted and no one was in danger. When the police succeeded in passing the Jaguar it was stopped at 12.50 a.m.; a breathalyser test was then given, and at 1.0 a.m. there was a positive reaction. The appellant

Jackson was then taken to the police station, and at 1.25 a.m. there was a second breathalyser test, again with a positive reaction. At 2.15 a.m., a doctor having arrived, a blood sample was taken; this was later found to contain no less than 118 milligrammes of alcohol per 100 millilitres of blood. The doctor, having examined the appellant Jackson, gave it, however, as his opinion that he was not then unfit to drive through drink; the doctor had previously noted the smell of alcohol, but had no doubt taken the appropriate tests. It was because of that doctor's opinion that count 1 was allowed to remain on the court file without further proceeding on it.

The appellant Jackson, after his plea, gave evidence as to the sequence of events before he was stopped at 12.50 a.m., and his case was as follows. For the whole day he had had no food at all, neither breakfast nor lunch. He had throughout the day engaged himself on business affairs and had been driving considerable distances. At 7.0 p.m. he had two pints of brown ale; then he had a normal dinner, with which he consumed one-third of a glass of wine followed by four brandies. At 10.0 p.m.—that is to say four hours before the blood test—he went for a walk. At 10.40 p.m. he commenced to drive from Brighton back to London. At 11.20 p.m. he unfortunately ran into the back of a car, but that was claimed to be no fault of his; about that time he was in conversation with a policeman who had not attributed to him any signs of influence of alcohol; and at 12.50 a.m. he was stopped as above stated. It was also his evidence that he was wholly unaware of the defective condition of his liver, to which this court will now turn.

After the plea of guilty Dr. Haler was also called. He gave evidence that the appellant Jackson was a person with high blood pressure, whose diet was lamentable and whose way of life was also from the medical point of view lamentable. He spoke of a malfunctioning liver, the malfunctioning of which appeared in combination with high blood pressure, and perhaps also with the diet and way of life, to produce the following effect: one way and another the result was retention in the blood of alcohol for a longer period than would be expected, though there was no statement as to how much longer than normal it was thus retained. It was said that the build-up of alcohol in the blood was below normal, and the excretion slow. These faults were attributed to defects of long-standing in the liver; and in essence that was the case for the appellant Jackson. The defects apparently were given no disease name—and counsel for the appellant Jackson was unable to suggest that there was a name for them. As already mentioned, the appellant Jackson was unaware of the defect, and it was said by Dr. Haler that, if he had been what he (Dr. Haler) described as “a normal man”, one would have expected a much less amount of alcohol in the blood at 2.0 a.m.; something very considerably less than the 80 milligrammes which is the prescribed level. This evidence appears to have been accepted by the sessions court.

In those circumstances, this court observes that the learned chairman of the South East London Quarter Sessions said when imposing sentence that, after listening to the appellant Jackson's evidence and to that of Dr. Haler and to the arguments advanced by counsel for the appellant Jackson:

“The result is that we think that in certain circumstances a condition such as yours which causes you to be more susceptible to building up alcohol in your body than a healthy man might amount to a special reason, but when we have regard to the fact which seems apparent, that this condition must have been arising for a considerable time and have existed for a considerable time, we decline in the present case, reluctantly in view of everything, to find special reasons.”

The monetary penalty imposed was, as already indicated, less than that normally imposed by that court in such circumstances; and with a view to an appeal the one year's disqualification imposed was suspended.

Turning now to the appellant Hart, he is aged 46, is a polio cripple, and his right lower arm has been amputated; he drives an invalid car. He lived at the material time at Cheyne Walk, Chelsea, and on the material evening (29th February 1968) he went in his invalid car to a public house within half-a-mile of his home. Then on the way back there occurred the following incident. At about 11.20 p.m. the police observed the appellant Hart, who was driving his invalid car at a modest speed, negotiate a "U" turn on a pedestrian crossing in the Kings Road. He completed the turn, drove eastwards swerving about, suddenly made a left turn into Lincoln Street despite two clearly displayed and illuminated "No Entry" signs, and was forced to stop because of a taxi approaching in the opposite direction. The police went up to him and, having smelt the alcohol on his breath, referred to what he had done and asked him to provide a specimen of breath for a breathalyser test. He said, "No, I can't, 'cause I've had a few drinks". He was again asked and he said "No". Later at the police station he was twice asked to provide a specimen of breath and he refused. He was then asked to supply a specimen of blood or urine, and he was told that if he refused he would be liable to the penalties which the Act provides; but he said "I am not giving anything". Later he was asked twice more, and he refused. When he was formally charged and cautioned he said, "No, it's all wrong. I am not that drunk". In court he was called into the witness box after he had pleaded guilty, and amongst his testimony occurs this passage with regard to the breathalyser test:

"The Deputy Chairman: The reason that you refused was? A.—For principle's sake because I thought that I did not do anything wrong. Honestly, I did not see what I did wrong on principle, Sir . . ."

Later, in relation to the refusal of the blood test he said similarly:

"Q.—Why did you refuse the blood test? Was that the same reason? A.—On principle, Sir, yes. On my principle, not the law's principles, but my personal principle."

From there it is convenient first to turn to his road traffic record. On 8th December 1966, for driving whilst unfit on account of drink, he was at Bow Street Magistrates' Court fined £5 and disqualified for six months. The six months is, of course, half the period provided by the Act, but neither the Crown nor counsel for the appellant Hart were aware of whether there was any certification of special reasons or what those special reasons were. Then, on 18th January 1967, again for driving whilst unfit owing to drink, he was at Marlborough Street Magistrates' Court given a conditional discharge for 12 months. In so doing there was utilised a loophole left by the provisions of s. 12 (2) of the Criminal Justice Act 1948, which technically enabled magistrates to avoid disqualifying those who had offended against s. 6 of the 1960 Act without entering on the register any special reason for this course. The procedure thus adopted at Marlborough Street was one which has more than once been frowned on by the Divisional Court; and the loophole has since been blocked by s. 51 of the Criminal Justice Act 1967, which refers to the *duty* of the courts when dealing with this class of case. (That Act, of course, only came into operation on 1st October 1967.) The next item on his record is that, after having been charged with the offence now under consideration (which was committed on 29th February 1968) but before the matter came before sessions, he committed further offences

on 4th May. For these he came before the Marlborough Street Magistrates' Court on 5th May. On that date, for failing to provide a sample of breath for a breathalyser test, he was given an absolute discharge; for once more driving while unfit to drive owing to drink—being the third time he had been found unfit in 18 months—he was fined £10, his licence was endorsed, but he was not disqualified. The special reason entered being that he was the driver of an invalid carriage and would suffer special hardship.

To these three convictions and to the way in which the magistrates dealt with them this court will advert later. It now turns to what was said by the learned deputy chairman at the conclusion of the matter now under appeal. Having stated, as indeed was not unnatural, that he had great sympathy for the appellant Hart, he went on to say:

"... if the law did not, as I think it does, compel me to do so, I would not impose a disqualification on you... I would impose a fine of 1s. for the sake of putting it in... I think the law must take its course and I think that somebody will find a way round the law."

To those observations also this court will later revert.

Turning now to the law, the leading case as to the meaning of the words "special reasons" is *Whittall v. Kirby* (1). The considered judgment of the Divisional Court was delivered by LORD GODDARD, C.J. At that time the relevant provisions as to driving a motor car when under the influence of drink or drugs were contained in s. 15 (2) of the Road Traffic Act 1930. The relevant words in that subsection were no different from those under the 1962 Act, which have already been recited. In that case, the absence of previous motoring convictions, and the fact that the retention of his licence was essential to the driver in order that he might continue to obtain a livelihood, were each urged as being a special reason; as also was the fact that a substantial fine was imposed. It was held that none of these three facts could constitute a special reason. LORD GODDARD, C.J., said:

"That a man is a professional driver cannot, as it seems to me, by any possibility be called a special reason... That in many cases serious hardship will result to a lorry driver or private chauffeur from the imposition of a disqualification is, no doubt, true, but Parliament has chosen to impose this penalty and it is not for courts to disregard the plain provisions of an Act of Parliament merely because they think that the action that Parliament has required them to take in some cases causes some or it may be considerable hardship."

Then there was stated the vital principle which is, and has continued to be, of general application. The law is stated thus:

"A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason'..."

Since the passing of the Road Safety Act 1967, a number of cases touching the relevant issues have come before this court and the Divisional Court. Thus, on 17th June 1968, there came before this court *R. v. Steel* (2) which concerned a conviction under s. 1 (1) of the 1967 Act. The judgment of the court was delivered by LORD PARKER, C.J., sitting with FENTON ATKINSON, L.J., and BRIDGE, J. The fact that the appellant was a professional driver with no previous conviction was once more urged as a special reason; but LORD PARKER, C.J., referred to *Whittall v. Kirby* (1) and said as regards that authority:

(1) 111 J.P. 1; [1946] 2 All E.R. 552; [1947] K.B. 194.

(2) (1968), 52 Cr. App. R.

"... it was laid down as clearly as could be that a matter peculiar to the defendant, such as his good character, was not a special reason within what was then the Road Traffic Act 1930. That is a decision which obtained very great publicity at the time. It has been thought to cause great hardship ever since. It has been, however, affirmed time and time again and the court that laid it down was a final Court of Appeal in those days in such a case; it was a Divisional Court on a Case Stated from the justices. Since then Parliament has re-enacted the same words with full knowledge of that decision, in 1960 and again in 1962, and further in 1962 in what are known as the totting up provisions in s. 5 (3) Parliament has deliberately avoided the use of those words by talking about mitigation. It is perfectly clear that in those circumstances this court, observing the intention and seeking to honour the intention of Parliament, must inevitably uphold the principle laid down in *Whittall v. Kirby* (1)."

That this passage in the judgment of LORD PARKER, C.J., correctly states the law is clear beyond argument here or elsewhere. Other decisions in 1968 included *James v. Hall* (2) on 25th June and *Brown v. Dyerson* (3) on 29th June, both by the Divisional Court, in which LORD PARKER, C.J., and BRIDGE, J., respectively, when delivering the judgments of that court, made it clear that they would have found it extremely difficult to hold in cases of excessive blood content of alcohol (i.e., over 80 milligrammes) that special reasons could be constituted either by the fact that the driver had drunk but a small amount of alcohol, or that he was unaware that he had been affected thereby, or that the driver's ability to drive was not shown to be impaired. In each of these cases the facts were such that it was not necessary to deal further with the law. A similar view was expressed by WIDGERY, L.J., giving the judgment of this court in *R. v. Scott* (4) a case to which further reference will be made. Finally, as regards s. 1 (1) of the 1967 Act, there is the decision of the Divisional Court in *Taylor v. Austin* (5) on 12th December, 1968. The relevant facts and the decision thereon of that court appear in the following passage from the judgment of LORD PARKER, C.J.:

"... the magistrate finally held that he found that there were special reasons, on three grounds: first, driving ability not impaired; indeed it was admitted by the appellant that his driving was in no way the cause of this accident, and there was no suggestion that in fact his driving ability was impaired. So far as that is concerned, this court is quite clear that that cannot be a special reason. It is no doubt a mitigating circumstance, but not a mitigating circumstance such as to amount to a special reason. The second ground was that the accident was no fault of the respondent. That really is wrapped up in the earlier ground. This offence has got nothing to do with impairment or accident, it is Parliament trying to arrive at some certainty and make it an offence whenever there is an excess of alcohol over the prescribed limit."

Then he adverted once more to the fact that hardship on the offender cannot be a special reason for not disqualifying him. So much for the recent decisions under the 1967 Act.

In addition, there were naturally cited to the court a series of decisions in cases that had arisen under s. 6 of the 1960 Act, and the provisions in earlier

(1) 111 J.P. 1; [1946] 2 All E.R. 552; [1947] K.B. 194.

(2) [1968] Crim. L.R. 507.

(3) [1968] 3 All E.R. 39; [1969] 1 Q.B. 45.

(4) post, p. 369.

(5) [1969] 1 All E.R. 544.

legislation which similarly related to driving by a person whose ability to drive properly is for the time being impaired by drink or drugs. That series included cases in which there was considered the position arising when the drink consumed immediately before the offence had, without the knowledge of the offender, been laced, or combined with some extraneous substance (drugs or chemicals) or affected by some extraneous incident without the offender being aware of the potential effects. These included *Chapman v. O'Hagan* (1)—the combined effects of drugs and alcohol; *R. v. Holt* (2)—amytal tablets and drink; *R. v. Julian* (3)—the effect of severe electric shock on tolerance to drink; and *Brewer v. Metropolitan Police Comr.* (4)—chemical fumes and drink. All these are, of course, in a different class to the instant case. They relate to some specific extraneous occurrence that took place shortly before the relevant incident. In addition, the court was pressed with—and at first sight impressed with—*R. v. Wickins* (5), on which counsel for the appellant Jackson strongly relied, a diabetes case.

For the purpose of considering special reasons, there are, however, as counsel for the Crown pointed out in the course of her admirably succinct and cogent series of submissions, basic distinctions between the offences created by s. 6 of the 1960 Act and those created by s. 1 and s. 3 of the 1967 Act. It must, indeed, always be borne in mind (as counsel for the appellant Jackson conceded, though counsel for the appellant Hart did not) that the special reasons which the court may take into account may well be different according to the offence committed. Regard must always be had to the nature of the offence, and also to the objective of the legislature. Thus, as regards s. 6 of the 1960 Act, the constituent components of the offence can normally involve an examination of factors such as what the accused has had to drink, what was his personal tolerance of alcohol, what was the nature of his driving before arrest, and what is the medical opinion on the above factors in relation to that particular man's capacity to drive.

Under s. 1 (1) of the 1967 Act, which is intended to and does put any driver at stern risk if he drinks before he drives, the sole test is an objective one depending on a scientifically ascertained measurement. The factors relating to a s. 6 of the 1960 Act offence are irrelevant—as, of course, is the end question of whether his capacity to drive was impaired. Under s. 3 (3) of the 1967 Act, unreasonable failure to provide a specimen is made an offence. The objective is to put at equally stern risk all those who unreasonably refuse to give the specimen; it is quite irrelevant whether the offender's capacity to drive was impaired or whether he had or had not got too much alcohol in his blood.

It is, of course, obvious that something which could be a special reason in relation to driving with impaired capacity could be no reason at all in relation to refusing to give a specimen. Indeed, it is difficult to envisage what could be a special reason in relation to an unreasonable refusal. Similarly, the issue whether there was a special reason for not including disqualification as a penalty may well in some instances (the court is, of course, *not* referring to cases where the offender has had to drive on an emergency journey: *R. v. Lundt-Smith* (6)) have to be decided differently as between cases of driving with impaired capacity and driving with an excessive amount of alcohol in the blood. This latter difference has already

(1) 113 J.P. 518; [1949] 2 All E.R. 690.

(2) [1962] Crim. L.R. 565.

(3) [1966] Crim. L.R. 52.

(4) ante, p. 185; [1969] 1 All E.R. 513.

(5) (1958), 42 Cr. App. Rep. 236.

(6) 128 J.P. 534; [1964] 3 All E.R. 225; [1964] 2 Q.B. 167.

been recognised in this court in *R. v. Scott* (1), where WIDGERY, L.J., made it clear that the court was not for the purposes of s. 1 (1) of the 1967 Act following the line taken in cases such as *R. v. Holt* (2). This court in *R. v. Scott* (1) declined to treat as a special reason the fact that sleeping tablets had been taken by the appellant, who had no idea of their adverse effect on the alcohol in her blood, and reserved the question whether it might have amounted to a special reason if the charge had been one of driving with impaired ability, stating:

"It is, we think, vital to appreciate that Parliament in creating this offence [under the 1967 Act] and giving statutory force to it has recognised that it is necessary to have a check on the consumption of alcohol which can be recorded in objective terms relative only to the resultant concentration of alcohol in the blood."

It follows from what has above been stated that the difficult and border-line decision in *R. v. Wickins* (3) is not an authority as regards cases arising under the 1967 Act. In those circumstances, it is not necessary for this court to say more about that decision than that it may, in relation to cases of driving with impaired capacity, require on some appropriate occasion further consideration by this court on two points: (i) whether it may not in essence be contrary to the general stream of authority on the subject; and (ii) whether in any event the precise words used by DEVLIN, J., do not go too far. For, although the judgment concerned a man suffering from diabetes without being aware of it, the phraseology runs:

"If it had not been for the fact that the appellant was suffering from diabetes, the offence would not have been committed at all . . ."

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Returning to the facts of instant cases, this court is prepared to make the following assumptions: first—albeit with considerable hesitation—that in neither case was there evidence that drink consumed by the appellant had impaired his capacity to drive. That is a phrase which must in law cover alike cases in which no sign of bad driving had been observed (whether or not there were other signs of the driver having been drinking) and cases in which there were such signs but the evidence cannot or does not establish that link between the consumption of drink and the impairment of capacity to drive required for a conviction under s. 6 of the 1960 Act. Secondly, that in the case of the appellant Hart he was a cripple unable to get home from the place he had been drinking without his invalid car, unless he hired a taxi or had transport assistance from a friend. Thirdly, that in the case of the appellant Jackson the evidence established an idiosyncratic state of his liver which, when combined with his blood pressure, caused the duration of retention of alcohol in the blood to be longer than usual to some unspecified extent and degree, and that he did not know of that idiosyncrasy. None of those facts thus assumed can constitute a special reason as regards an offence created by s. 1 or by s. 3 of the 1967 Act.

As regards the first assumption, this court respectfully and fully endorses what was said by LORD PARKER, C.J., in *Taylor v. Austin* (4). Nothing could

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be clearer than that the whole object of the relevant section of the Road Safety Act 1967 was in the public interest to create an offence for which evidence of impairment of driving ability was irrelevant and for which disqualification was mandatory. To permit after conviction an investigation into this irrelevant matter would defeat the whole purpose of the provisions.

As to the second assumption, this court finds itself quite unable to comprehend how any tribunal could find that the fact that the driver was a cripple who required transport was a special reason in relation to the offence of unreasonably refusing to give a specimen. The fact that he was a cripple simply has no relation at all to the offence. The refusal in the instant case was stated to be "on principle". Indeed, this court finds difficulty in conceiving what could be a special reason in relation to an unreasonable refusal. Moreover, having regard to the course taken by the Marlborough Street magistrate in May in relation to the conviction under s. 6 of the 1960 Act, this court feels constrained to observe that the fact that the offender was a cripple quite obviously was peculiar to the offender and not to the offence. Disabled drivers of cars are no less liable to injure members of the public by their driving than those who are not invalids. Indeed, the comparative risks entailed by the former driving with impaired capacity may well be the greater. If the legislature had wished to treat such drivers in a less stern way it could have said so, but it has not.

As to the third assumption, any general state of health of an offender or bodily defect (as counsel for the appellant Jackson has put it) can only be peculiar to the offender and not to the offence; at any rate, as regards offences under s. 1 and s. 3 of the 1967 Act. It makes no difference whether or not that state of health or its effect are known to him. It would produce, incidentally, an impossible situation if, after conviction under s. 1 of the 1967 Act, the driver could embark on an investigatory trial involving an examination of the condition of his organs, be it liver or kidney or as the case may be, with the aid of evidence as to how much drink he had consumed—a matter so often the subject of dubious testimony—and a comparison of that condition with those of the organs of others. Section 1 refers to "his blood", and not to the blood of anyone else or of any class of persons. As counsel for the Crown aptly pointed out, it does not refer to the blood of the man on a Clapham omnibus. Moreover, as LORD PARKER, C.J., said in another connection in the *de minimis* case of *Delaroy-Hall v. Tadman* (1):

"Unless the line is drawn with certainty, it would be almost impossible to achieve any uniformity in practice and courts would be exercising a dispensing power which the Acts do not confer on them."

Those words may well not be irrelevant to the matter now under consideration.

The instant case, incidentally, provides a good example of the impossible position that would be created if the court after conviction had to go into questions peculiar to the offender, such as whether the characteristics of his liver caused the alcohol content of his blood at some point of time to be above average. That would entail not only an examination of what drink he had consumed and when he consumed it, but also what degree of difference there was between his liver and that of others, whether he gave the doctor accurate information for the latter's test, and perhaps also how far the liver condition was produced by his own conduct. Incidentally, Dr. Haler gave no tenable explanation as to how as much as 118 milligrammes could have been in the appellant Jackson's blood on that night. Nor did he suggest (nor, so far as this court is

aware, could he have suggested) that the longer the alcohol remains in the blood the less is the driving ability impaired. Nor did he suggest that the extent to which a person with such an excess of alcohol in his blood is aware of being affected by its concentration diminishes when the alcohol has been there for some time.

The loopholes which would be created if the court acceded to the submissions of the appellants are particularly well illustrated in the present cases by reference to the facts already mentioned. In both cases their driving had been erratic; in both cases they had the smell of drink about them; the appellant Hart is a man who has three times since 1966 been convicted of driving whilst under the influence of drink; and in the appellant Jackson's case the court was asked to rely on potentially unreliable evidence as to the consumption of drink by him on the day of issue and also on the day before he saw his doctor. Indeed, on the evidence as it emerged in these two cases, this court thinks it right to state that even if, contrary to its stated conclusions, it had considered in either case that any of the facts assumed could have in law constituted a special reason, yet on the facts as a whole it would in neither have been disposed to reduce the period of disqualification imposed by the relevant statutory provisions. The respective courts before whom the appellants' cases originally came do not appear to have fully appreciated the implications of the facts in evidence before them.

Finally, this court thinks it necessary to refer back to the passage in the judgment of LORD GODDARD, C.J., in *Whittall v. Kirby* (1) as to how essential it is for the courts not to disregard the plain provisions of an Act of Parliament merely because they think that they have been required to take action which in certain cases involves hardship. It is well known that the relevant provisions of the Road Safety Act 1967 stem from a combination of the need to discourage drivers from drinking before they drive and the reluctance of some tribunals (mainly juries) to convict drivers under the 1960 Act. To provide loopholes in this Act, contrary to the intention of Parliament, is no function of the courts; and this court notes with some concern that on two separate occasions the metropolitan magistrates at Marlborough Street refrained from disqualifying the appellant Hart on grounds which were untenable, and that the deputy chairman at Inner London Sessions appeared to be anxious that loopholes should be provided, despite the previous convictions of the appellant Hart for driving when his capacity was impaired by drink. As regards the general public, the severity of the provisions of the Road Safety Act 1967 are now well known, as, however, also are the benefits those provisions have brought. There are more ways than one by which a member of the public can find out his personal tolerance of alcohol and his idiosyncracies of the types discussed. Above all, it is open to every man not to drink if he is going to drive.

The appeals are, accordingly, dismissed.

Appeals dismissed.

Solicitors: *Registrar of Criminal Appeals; David Forsyth, Oxted; Solicitor, Metropolitan Police.*

T.R.F.B.

(1) 111 J.P. 1; [1946] 2 All E.R. 552; [1947] K.B. 194.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., BLAIN AND DONALDSON, JJ.)

March 4, 1969

ANDERSON v. GRADIDGE

Betting—Licensed betting office—User for purpose other than betting—Private meeting after closing hours—Betting, Gaming and Lotteries Act, 1963, s. 10 (1), Sched. 4, para. 1.

The words in para. 1 of Sched. 4 to the Betting, Gaming and Lotteries Act, 1963, that premises licensed as a betting office "shall not be used for any purpose other than the effecting of betting transactions" mean that the premises must not be used at any time for such a purpose. Accordingly, where the licensee of a betting office used the office after closing hours for a private meeting of the local book-makers' association,

HELD: he had committed an offence against s. 10 (1) of the Act.

CASE STATED BY Aldershot justices.

An information was preferred by the respondent, Frederick Philip Gradidge, a police officer, against the appellant, William Hugh Anderson, alleging that the appellant, being the holder of a betting office licence, had used the licensed premises for purposes other than for betting transactions, namely, for the purpose of holding a meeting, contrary to s. 10 of the Betting, Gaming and Lotteries Act, 1963, and para. 1 of Sch. 4 to the Act. On the hearing of the information at Aldershot Magistrates' Court on July 29, 1968, the magistrates held that this user of the premises was an infringement of the Act even though the meeting was held at a time when the betting office was closed in pursuance of r. 1 of the Rules for Licensed Betting Offices, and they convicted the appellant, who appealed.

I. S. Hill for the appellant.

M. T. Underhill for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county of Hampshire sitting at Aldershot who convicted the appellant of an offence against the Betting, Gaming and Lotteries Act, 1963, the allegation being that he at nos. 11 to 13, Cove Road, being the holder of a betting office licence, did use such premises for purposes other than betting transactions, the placing of bets and collection of winnings, namely, for the purpose of holding a meeting.

The short facts were that soon after 10.0 p.m. on an evening in March a police constable passed these premises and noticed that there were lights on, and indeed he saw a lady open the door and go in. He then entered the premises, as he was entitled to do, which were not locked, though they had a closed sign up. Inside the betting shop there were a number of men sitting in chairs; there were bottles and glasses on the counter and most of them were drinking. He was told it was a private meeting, as indeed it was, being a meeting of the Aldershot and District Book-makers' Association, of which the appellant was a member; and the lady who had gone in was his wife.

The sole point here is whether the Act of 1963 makes it an offence to use the premises for some other purpose at any time, or whether it is confined, as the appellant suggests, to such times as the betting office is licensed to be open.

Section 10 (1) of the Betting, Gaming and Lotteries Act 1963, provides:

"A licensed betting office shall be managed in accordance with the rules set out in Schedule 4 to this Act . . ."

and provides that any contravention shall be an offence. Then one goes to Sch. 4, para. 1, which is in these terms:

"The licensed premises shall be closed throughout Good Friday, Christmas Day and every Sunday, and at such other times, if any, as may be prescribed, and shall not be used for any purpose other than the effecting of betting transactions".

It is a short point; it seems to me that those words mean what they say, that at no time must the premises be used for any purpose other than the effecting of betting transactions, and to give it the meaning suggested by the appellant would mean reading in words, and accordingly I come to the conclusion the justices were perfectly right; I would dismiss this appeal.

BLAIN, J.: I agree. I add only that there is no reason to think that this was anything but a reputable meeting or gathering which happened to take place on premises where it was unlawful that any use other than the statutory one should be made.

DONALDSON, J.: I agree.

Appeal dismissed.

Solicitors: *Batchelor, Fry, Coulson & Burder*, for *Foster, Wells & Coggins*, Aldershot; *P. K. L. Danks*, Winchester.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ., AND O'CONNOR, J.)

October 25, 1968

R. v. SCOTT

Road Traffic—Driving with blood-alcohol concentration above prescribed limit—Disqualification—Special reasons—Impairment of ability to drive through combination of drink and drugs—No knowledge of effect of drug—Road Traffic Act, 1962 (10 & 11 Eliz. 2 c. 59), s. 5 (1)—Road Safety Act, 1967 (c. 30), s. 7 (1).

The appellant pleaded guilty to driving a motor vehicle having consumed alcohol in such a quantity that the proportion thereof in her blood exceeded the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967. She was fined and disqualified for holding a driving licence for twelve months. On appeal against the order of disqualification, she contended that there were special reasons within the meaning of s. 5 (1) of the Road Traffic Act, 1962, as applied by s. 5 (2) (a) of the Act of 1967, why the mandatory period of disqualification should not be imposed, namely, that she had been taking, under medical treatment over a period of years, two kinds of tablets, anti-depressant tablets and sleeping tablets, and that, while she knew that it was dangerous to drink after taking the anti-depressant tablets, she had no idea that a combination of sleeping tablets and drink would produce a more violent reaction in terms of her ability to drive than if she had taken the drink alone.

HELD: the aforementioned circumstances could not amount to special reasons in the case of an offence under s. 1 (1) of the Act of 1967.

APPEAL against sentence by Myra June Scott, who, on February 16, 1968, pleaded Guilty at Essex Quarter Sessions to driving a motor vehicle with a blood-alcohol concentration above the prescribed limit, contrary to s. 1 (1) of the Road Safety Act, 1967, and was ordered to pay a fine of £20 and 25 guineas

costs, and was disqualified for 12 months. She appealed against the sentence of disqualification on the ground that there were special reasons under s. 5 (1) of the Road Traffic Act, 1962, as applied to an offence under s. 1 (1) of the Act of 1967 by s. 5 (2) (a) of that Act, which would entitle the court not to impose mandatory disqualification.

M. J. Segal for the appellant.

F. Irwin for the Crown.

WIDGERY, L.J., delivered this judgment of the court: On 16th February 1968, the appellant pleaded guilty at Essex County Quarter Sessions to driving with a blood-alcohol concentration above the limit prescribed by s. 1 of the Road Safety Act 1967. She was fined and was subjected to the mandatory disqualification of 12 months, which follows a conviction for that offence. She now appeals against her disqualification by leave of the full court, the question being whether there were, contrary to the learned chairman's belief, special reasons which would entitle the court not to impose the mandatory disqualification.

At about 11.15 p.m. on 31st October 1967, a taxi-driver saw a stationary car outside Harlow Town railway station. It was half on the road and half on the pavement. It had obviously been in recent and violent contact with a post on the side of the pavement. The appellant was sitting in the driver's seat with her legs on the pavement and the driver's door was open. She could not stand still when she got out, and when the taxi-driver (who was concerned for her) asked where she lived she said "Afghanistan", which was not the fact. He telephoned to the police, and when the police came the appellant was staggering around, and there was a great deal of evidence to indicate that she was significantly under the influence of alcohol. She was given a breath test, and the following blood sample test showed she had 119 milligrammes of alcohol per 100 millilitres of blood. That, of course, is considerably in excess of the statutory limit of 80. Her explanation, which the court accepted as true for the purposes of dealing with this appeal, was that she had been treated by her doctor for a number of years and the treatment included two kinds of tablets: (i) anti-depressant tablets; and (ii) sleeping tablets. She knew that it was dangerous to drink in conjunction with the anti-depressant tablets, but she had no idea that a combination of drink and sleeping tablets would produce a more violent reaction in terms of her ability to drive than if she had taken the drink alone. She said that in all innocence in that sense she had had drink on this day after taking sleeping tablets and that that was the cause of the condition in which she was found.

The court accepts those facts for the purposes of this appeal; and, no doubt, if the offence charged had been driving when her ability to drive was impaired, all those matters would have been highly significant in mitigation and indeed might (we say no more) have amounted to special reasons. But the point which is conclusive in this case is that those circumstances cannot, in the judgment of this court, amount to special reasons for the purposes of an offence under s. 1 (1) of the Road Safety Act, 1967. It is, we think, vital to appreciate that Parliament in creating this offence and giving statutory force to it has recognised that it is necessary to have a check on the consumption of alcohol which can be recorded in objective terms relative only to the resultant concentration of alcohol in the blood. In a charge under s. 1 (1) of the Act of 1967, the question whether the driver's ability is impaired is not relevant to guilt, although, of course, it may be a matter of mitigation. Whether it can be a special reason for the purposes of relieving the court of the obligation to disqualify has not yet been finally settled. There are two authorities to which our attention has been drawn. The

first is *James v. Hall* (1), a Divisional Court case, where LORD PARKER, C.J., in dealing with an argument that the fact that the driver's ability was not impaired might be a special reason, said:

"I have grave doubts whether the fact that he had drunk but a small amount of alcohol, let alone that he was unaware that he had been affected thereby, could be special reasons."

Further, in the more recent case of *Brown v. Dyerson* (2), where this point arises more directly, BRIDGE, J., having referred to the argument of counsel for the Crown that the fact that the driver's ability was impaired could not be a special reason, said:

"For my part I find those arguments extremely compelling, and as at present advised I do not see how they are to be effectively countered."

This court would not wish finally to close the door on any future argument on this point, the door having been left open in those two cases; but we would not wish to add any support to the view that it is a special reason if one proves that one's ability was not impaired. That matter in its simple terms must remain open,* but, of course, in this case the evidence was overwhelming that the appellant's ability was impaired. It is, in our judgment, quite hopeless in this particular case to argue, as counsel for the appellant has sought to argue, namely, that, although her ability was impaired, she might reasonably not have anticipated it would have been impaired and, therefore, that some special reason can be produced. Whatever may ultimately be the decision as to whether the capacity of the driver can be a special reason, it is a point which is of no avail to the appellant in this case, and we are quite satisfied on the facts of this case that the chairman was right. There was no special reason, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; T. Hambrey Jones, Chelmsford.*

T.R.F.B.

(1) [1968] Crim. L.J. 507.

(2) 132 J.P. 495; [1968] 3 All E.R. 39.

*See now the later case of *R. v. Jackson, R. v. Hart*.

COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND PHILLIMORE, L.JJ. AND GEOFFREY LANE, J.)

R. v. ITHELL. R. v. JONES. R. v. TOMLINSON

January 17, 1969

Criminal Law—Sentence—Suspended sentence—Offence committed during period of suspension—Sentence for that offence to be considered first—Question of bringing into effect suspended sentence then to be considered—Suspended sentence normally to take effect consecutively to sentence for fresh offence.

Where a fresh offence has been committed during the suspension of an earlier sentence the court before whom the offender is brought should first consider the fresh offence and determine the appropriate sentence for it and should then consider the question of bringing into operation the suspended sentence. Unless there are exceptional circumstances, the court should order that the suspended sentence should take effect and run consecutively to the sentence imposed for the current offence.

APPEALS by John Foster Ithell, Albert Edward Jones, and Thomas Jeffrey Tomlinson, against sentences imposed on them at Denbighshire Quarter Sessions on 15th May, 1968.

The appellant Ithell and the appellant Jones had each pleaded guilty to storebreaking and larceny; each had been sentenced by the same court on 20th February 1968 to a suspended sentence of two years. The court ordered, in each case, that the suspended sentence should take effect immediately and that a sentence of 18 months' imprisonment for the current offence of storebreaking and larceny should run consecutively thereto, making a total of 3½ years. The appellant Tomlinson pleaded guilty on three counts of storebreaking and larceny. He had been sentenced on 8th January 1968 to six months' suspended sentence. The court ordered that the suspended sentence should take effect immediately; he was sentenced on one count to nine months' imprisonment, on another to nine months concurrent and on the third count to two years consecutive, all to run consecutively to the sentence previously suspended, making a total of three years and three months.

J. M. T. Rogers for the appellants.

The Crown was not represented.

EDMUND DAVIES, L.J., referred to the charges and sentences and continued: The appellants now appeal against their sentences with the leave of the single judge, and the chief ground on which that leave was granted was that it appeared to him that the learned deputy chairman fell into error in the manner in which he approached the question of putting into operation a suspended sentence. We agree with the single judge. The proper approach, where a fresh offence has been committed during the period of suspension of an earlier sentence and the accused is brought before the court, is that the court should first sentence him in respect of the fresh offence by punishment appropriate to that offence, and thereafter address itself to the question of the suspended sentence. Furthermore, as LORD PARKER, C.J., said in *R. v. Brown* (1), unless there are some quite exceptional circumstances, the suspended sentence should be ordered to run *consecutively* to the sentence given for the current offence. In the present case the deputy chairman proceeded first of all to deal with the earlier sentences and, rightly taking the view that there was no reason why the suspensions should not be removed, he ordered that they should take effect. Only then did he go on to consider the sentences which he thought appropriate for the offences in respect of which the accused were before the court. The order in which these matters are approached can have practical importance, and we do not approve of the one which was here adopted. Cases can easily arise where the type and duration of sentence imposed for the current offence would materially affect the court's selection of the most suitable among the four courses regarding suspended sentences left open to it by s. 40 (1) of the Criminal Justice Act 1967. Having said that, however, we consider that on the facts of the present case the court nevertheless arrived at the correct result. [His LORDSHIP then referred to the facts and the grounds of appeal against sentence and concluded that the court could not accede to any suggestion that the sentences were wrong in principle.]

Appeals dismissed.

Solicitor: *Registrar of Criminal Appeals.*

(1) (1968), *The Times*, Nov. 12.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., BLAIN AND DONALDSON, JJ.)

March 3, 6, 1969

SUPERHEATER CO., LTD. v. COMMISSIONERS OF CUSTOMS AND EXCISE

Exchange Control—Export of goods—Prohibited destination—Condition precedent as to prior payment not fulfilled—Ultimate destination—Southern Rhodesia or South Africa—goods consigned to South Africa for re-consignment to Southern Rhodesia—Exchange Control Act, 1947 (10 & 11 Geo. 6 c.14), s. 23 (1), (4)—Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), s. 56 (1).

The appellants had for many years supplied superheaters and accessories to Rhodesia Railways. Between 1942 and 1962 goods were ordered and supplied through S., the appellants' representatives in South Africa, but from 1962 to 1965 the appellants had usually dealt direct with Rhodesia Railways. In November, 1965, the government of Southern Rhodesia made a unilateral declaration of independence, and as a result of various statutory instruments made soon thereafter Southern Rhodesia was excluded from the scheduled territories. Accordingly, under s. 23 (1) of the Exchange Control Act, 1947, exports of goods to Southern Rhodesia were prohibited unless the Commissioners of Customs and Excise were satisfied that payment had been made in advance and in the prescribed manner. At the time there were outstanding six orders placed by Rhodesia Railways directly with the appellants, and one placed with the appellants through S. The appellants arranged that the outstanding orders placed by Rhodesia Railways direct with them should be cancelled and that orders placed through S. should be substituted. These orders were sent c.i.f. Port Elizabeth, instead of f.o.b. Mersey port. At Port Elizabeth the goods were kept in bond and re-marked and re-consigned to Rhodesia Railways, and the same procedure was followed with regard to subsequent orders. Informations were preferred against the appellants charging them with exporting goods the ultimate destination of which was Bulawayo, contrary to s. 23 (1) of the Exchange Control Act, 1947, so as to render them liable to penalties under s. 56 (1). The magistrate held that the ultimate destination of the goods was Bulawayo and that the offence had, accordingly, been committed, and on appeal by the appellants quarter sessions took the same view and confirmed the convictions. On appeal by the appellants to the Divisional Court,

HELD: that the convictions were right, inasmuch as the ultimate destination of the goods was Bulawayo, because (per LORD PARKER, C.J.) the question of the ultimate destination of the goods could not be confined to the strict contractual position, and that, let alone intention or contemplation or anything less, the whole object of the transaction was that the goods should go to Bulawayo; (per BLAIN, J.) it was always the intention of the appellants at the time of exportation that the goods should go to Bulawayo, and Bulawayo was, accordingly, the destination, or if not, it certainly was the ultimate destination; (per DONALDSON, J.) the true test under s. 23 (1) of the Act of 1947 was the contemplated rather than the intended destination, and the appellants always intended and contemplated that the goods would go to Southern Rhodesia as part of a continuous transit from the United Kingdom.

CASE STATED by the recorder of Liverpool.

On 10th January 1968, the appellants, the Superheater Co., Ltd., were convicted before the stipendiary magistrate for the city of Liverpool on ten of a total of 20 charges brought against them by the respondents, the Commissioners of Customs and Excise. Each of the ten charges on which the appellants were convicted alleged that on a date specified in that charge, at Birkenhead the appellants exported certain goods the exportation of which was prohibited by s. 23 (1) of the Exchange Control Act 1947, contrary to s. 56 (1) of the Customs and Excise Act 1952.

The dates specified in the respective charges and the goods to which the respective charges related, were as follows: (i) 24th March 1966—162 superheater

elements; (ii) 28th July 1966—63 superheater elements; (iii) 25th August 1966—233 superheater elements; (iv) 23rd September 1966—26 superheater elements; (v) 9th January 1967—62 superheater elements; (vi) 13th April 1966—1,000 clamp bolts and 30 cutters; (vii) 6th May 1966—79 superheater elements; (viii) 23rd August 1966—48 clamp bolts; (ix) 13th October 1966—508 clamp bolts; (x) 24th October 1966—500 clamp bolts.

The appellants appealed against their convictions on each of the above charges, and the recorder heard the appeals together with other appeals by the respective parties which were not material to this case.

At the hearing of the appeals on April 23, 24, 25 and 26, 1968, the following facts material to this case were proved or admitted before him: The appellants for many years supplied superheaters and accessories for the use of a concern known as Rhodesia Railways. This railway served and ran through the territories in Africa formerly known as Southern Rhodesia, Northern Rhodesia and Bechuanaland. It was a body corporate and operated with headquarters in Bulawayo, Southern Rhodesia. In 1942 the appellants entered into an agreement with Stone Stamcor (Pty.), Ltd., a company who described themselves as electrical and mechanical engineers with a head office in Johannesburg, South Africa. Under this agreement goods for various railway systems in Africa were ordered and supplied. Such goods were supplied for South African Railways up to and including the year 1966. From 1942 to 1962 goods were supplied under the agreement to Rhodesia Railways but from the year 1962 until the year 1965 it became the usual practice for Rhodesia Railways to order and pay for the goods direct from the appellants. Occasional orders for goods for Rhodesia Railways were placed by Stone Stamcor and one such order was still outstanding in 1966. After the announcement of a unilateral declaration of independence by Mr. Ian Smith in November 1965 and coincident with and subsequent to a series of Orders made by the British government under and in connection with s. 23 of the Exchange Control Act 1947 and s. 56 of the Customs and Excise Act 1952, the appellants were aware of a change of circumstances insofar as trade with persons or concerns in Southern Rhodesia were involved. A review of the trading situation with Rhodesia Railways was put in hand by the appellants on 12th November. A series of contemporary memoranda, letters and documents were put in and exhibited in a folder entitled "Correspondence". In addition three folders relative to shipments were put in. The effect of the orders made in November and December 1965 was that Rhodesia became a prescribed territory and goods exported from the United Kingdom to Rhodesia became subject to exchange control. Arrangements for prepayment in authorised currency had to be approved by the Commissioners of Customs and Excise. Neither South Africa nor Zambia were prescribed territories. As was apparent from documents 3 to 25 in the folder entitled "Correspondence", there was substituted for the previous procedure of dealing directly with Rhodesia Railways under which goods had been consigned f.o.b. Mersey port for Bulawayo, an arrangement with Stamcor that the orders for goods already placed referenced and identified would be cancelled and precisely similar orders similarly cross referenced would be placed by Stamcor and consigned c.i.f. Port Elizabeth. It was known and understood as appeared from document 28 in the folder entitled "Correspondence", that goods sent to Stamcor were to be re-marked and reconsigned to Rhodesia Railways. With reference to the arrangement, one Ockenden for the appellants stated in January 1967 to two officers of Customs and Excise that Stamcor had been contacted and asked if they would consider goods being ostensibly booked to them but the

ultimate destination would be Rhodesia. All the goods which were the subject of these charges were exported in accordance with this arrangement and the conditions relative to exchange control insofar as Rhodesia was concerned, were not complied with. All the goods were received by Rhodesia Railways in Bulawayo, and taken into stock. Certain of the goods were re-issued by Rhodesia Railways to various of their depots in Zambia for use on locomotives operating in Zambia. In July 1967, the integrated railway systems became separately administered as to that portion in Zambia. Stamcor paid the appellants in South African rands for all goods which were dealt with in accordance with the new procedure and were themselves allowed a commission on all such goods.

It was contended before the recorder by the appellants that no offence had been committed by them in relation to any of the goods on the grounds: (a) that on the true construction of s. 23 (1) and (4) of the Exchange Control Act 1947, the "ultimate destination" within the meaning of those sections of goods exported, was the ultimate destination to which the exporter of those goods had contracted to deliver those goods, and (b) that on the facts, and on the true construction of s. 23 (1) and (4) of the Exchange Control Act 1947, the destination, and the ultimate destination, of all the goods exported by the appellants, was Port Elizabeth in the Republic of South Africa. It was contended before him by the respondents that the appellants had been rightly convicted on the grounds that on the facts set out, and on the true construction of s. 23 (1) and (4) of the Exchange Control Act 1947, the ultimate destination of all the goods exported by the appellants was Bulawayo in Rhodesia.

The recorder was of the opinion that the contentions of the respondents were correct and he accordingly dismissed the appeals. The appellants now appealed. The question for the opinion of the court was whether the recorder was right in deciding on the facts set out, and on the true construction of s. 23 (1) and (4) of the Exchange Control Act 1947, that the ultimate destination of the goods exported by the appellants was Bulawayo in Rhodesia.

Geoffrey Howe, Q.C., and R. R. Leech for the appellants.

G. Heilpern, Q.C., and N. W. M. Sellers for the Commissioners of Customs and Excise.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of the recorder of the city of Liverpool, who dismissed an appeal by the appellants, the Superheater Co., Ltd., against their conviction by the stipendiary magistrate for the city of Liverpool on ten charges preferred by the respondents, the Commissioners of Customs and Excise, for that at Birkenhead the appellants exported certain goods the exportation of which was prohibited by s. 23 (1) of the Exchange Control Act 1947, contrary to s. 56 (1) of the Customs and Excise Act 1952.

Before looking at the facts here, it is convenient to look briefly at the sections in question. The section which creates the offence is s. 56 (1) of the Customs and Excise Act 1952. So far as it is relevant to these proceedings, it provides that:

"If any goods are—(a) exported . . . and the exportation or shipment is or would be contrary to any prohibition or restriction for the time being in force with respect to those goods under or by virtue of any enactment . . ."

then to put it quite shortly, the goods may be forfeit and penalties imposed. The prohibition or restriction in question here is one which was made under the Exchange Control Act 1947. Section 23 of that Act provides:

" . . . The exportation of goods of any class or description from the United Kingdom to a destination in any such territory as may be prescribed is

hereby prohibited except with the permission of the Treasury, unless the Commissioners of Customs and Excise are satisfied—(a) that payment for the goods has been made to a person resident in the United Kingdom in such manner as may be prescribed in relation to goods of that class or description exported to a destination in that territory, or is to be so made not later than six months after the date of exportation; . . .

“(4) Any reference in this section to the destination of any goods includes a reference to the ultimate destination thereof.”

The question, as it will appear, is whether the goods the subject of these charges were exported to a destination in Rhodesia. In fact they went to and were intended for Rhodesia Railways at Bulawayo. Prior to what is referred to as U.D.I., the unilateral declaration of independence in Rhodesia, which was on 11th November 1965, it would be perfectly possible for an exporter in this country to export goods to Rhodesia, or, to take this case, to Rhodesia Railways at Bulawayo, and to receive payment in sterling, and indeed payment in sterling within six months from the exportation. As a result of U.D.I., however, three statutory instruments* came into force which had the effect of providing by 18th December 1965 that payment for exports to Rhodesia had to be, to put it in general terms, in hard currency and paid in advance, in other words Rhodesia had come out of the sterling area and become one of the prescribed territories. If therefore the destination, or the ultimate destination, of the goods the subject of these charges was Rhodesia and Bulawayo, then it is conceded that the permission of the Treasury had not been obtained, nor had the Customs been satisfied in the matters set out in s. 23 (1). In other words the goods would have been exported within the meaning of s. 56 (1) of the Customs and Excise Act 1952 contrary to the prohibition.

Before looking at the facts, I would like myself to make two observations. First, it is to be observed that the offences charged against the appellants were not offences of exporting goods which had become illegal by what one may call sanction measures, but were offences contrary to exchange control, and it is important to bear that in mind. The second is that there is no suggestion whatever that the arrangements to which I will refer, made by the appellants, were in any way a sham or in any way a device to get round exchange control. I think it is only right to make that perfectly clear, and indeed it is to be observed that they were acquitted both by the stipendiary magistrate, and on appeal by

* By the Exchange Control (Scheduled Territories) (Amendment) (No. 3) Order 1965 (S.I. 1965 No. 1941), Sch. 1 to the Exchange Control Act 1947, as amended, was further amended by adding at the end of para. 28 the words “and Southern Rhodesia”. The effect of this was to exclude Southern Rhodesia from the list of scheduled territories. The scheduled territories are specified at the date of this report in Sch. 1 to the Exchange Control (Scheduled Territories) Order 1967 (S.I. 1967 No. 1767) as amended, and the order of 1965 has been revoked. Southern Rhodesia is not named in the list of scheduled territories in the order of 1967.

The Exchange Control (Payments) (Amendment) Order 1965 (S.I. 1965 No. 1940) amended the Exchange Control (Payments) Order 1959. Both have been revoked and replaced by the Exchange Control (Payments) Order 1967 (S.I. 1967 No. 1189).

By the Exchange Control (Exports to Southern Rhodesia) Directions 1965 (S.I. 1965 No. 2039), made and coming into operation on 1st December 1965, s. 23 (1) (a) of the Exchange Control Act 1947, had effect in relation to the exportation of goods of any class or description from the United Kingdom to a destination in Southern Rhodesia as if the words “or is to be so made not later than six months after the date of exportation” were omitted. The effect of this was to bring about a prohibition of the exportation of goods from the United Kingdom to destinations in Southern Rhodesia unless payment for the goods had been made prior to their exportation. Paragraph 2 of the directions provided: “Any reference in these directions to the destination of any goods includes a reference to the ultimate destination thereof.”

the recorder, of other charges of knowingly seeking to evade the prohibition, indeed it was held that they had no idea at the material time of the exchange control position.

With that introduction, it is necessary to look shortly at the facts. The appellants had in South Africa at Johannesburg representatives known as Stone Stamcor (Proprietary), Ltd. (for convenience "Stamcor"); they had been appointed representatives and sole selling agents for the class of goods dealt in by the appellants as long ago as 1942. I am by no means clear that the actual terms of that agreement are really very material in this case, but in passing it is to be observed that Stamcor was appointed—

"the sole representative of the appellants for obtaining orders for and selling of the goods apparatus and appliances exclusively connected with the railway locomotives now manufactured or sold by..."

the appellants. Clause 12 further provided that—

"Orders for any of the agreed goods shall only be accepted by the representative at the prices and upon the terms as to delivery and payment previously quoted or arranged by the company as aforesaid or at such other prices and terms as the company may from time to time in writing previously instruct the representative."

By cl. 13, which is important, it was provided that:

"Subject as aforesaid orders for any of the agreed goods in or for the said territory shall be accepted by the representative in its own name and entirely on its own behalf liability and responsibility and the company without its previous written consent shall at no time be liable upon any contract therefor entered into by the representative with its customers."

Clause 14 provided for the payment of commission or discount; finally by cl. 17 provision was made for the representatives to pay the appellants for all the agreed goods ordered by the representatives from the appellants.

For a time goods were supplied pursuant to that agreement, to Stamcor, which goods were goods sold on to the South African Railways and sometimes to the Rhodesia Railways. But there was a departure from the strict terms of that agreement in 1962, because from that time up to the times in question herein, it was the practice for Rhodesia Railways to enter into direct contracts with the appellants and not, as it were, through Stamcor, and to order and pay for the goods direct to the appellants. That was the general practice from 1962 to 1965 in regard to Rhodesia Railways, although it is found in the Case that there were occasional departures when the procedure under the agreement of 1942 was adopted. In fact we are told that one of the charges here relates to a case not of a direct contract, but of a contract through Stamcor made before U.D.I. What came then was U.D.I. on 11th November 1965, and immediately difficulties arose. The difficulties that did arise pertained to the difficulty of shipping, and not in any way to exchange control, and not in any way, as I have said, to any prohibition of the export of goods relating to measures by way of sanctions. At the time of U.D.I. there were seven orders outstanding, six direct from Rhodesia Railways and one from Rhodesia Railways, if I may use a neutral term, through Stamcor. Thereupon, and it is unnecessary to go through the correspondence, ways and means were sought for ensuring that the goods the subject of these seven outstanding contracts should get to Rhodesia Railways.

To put it quite shortly, what was arranged was that Rhodesia Railways would cancel the existing orders, renew them with Stamcor, and Stamcor

would then pay the appellants. In fact it involved this, that whereas under the contracts originally made direct with Rhodesia Railways, the appellants were to ship the goods f.o.b. Mersey port, the arrangements made, and it is really a tripartite arrangement, were that the goods were to be shipped c.i.f. Port Elizabeth, that Rhodesia Railways would pay the cost, insurance and freight to Stamcor, who would pay that on to the appellants in addition to the quoted price, but taking its commission or discount, in this case I think ten per cent. Those arrangements are embodied in letters in the correspondence, and it is quite clear first that the arrangement covered the same specific goods which had been the subject of the direct contracts, and that throughout the reference numbers were the same reference numbers as in the original contracts; the scheme throughout was that these goods, some of which had been ordered and made to drawings supplied by Rhodesia Railways, should reach Bulawayo; Stamcor when the goods reached Port Elizabeth was to re-mark and re-assign the goods on to Bulawayo, and indeed provision was made that they were to be kept in bond in Port Elizabeth. That concerned the seven contracts which were in existence at the time of U.D.I. Thereafter fresh contracts were made, some three in number amounting in all to some £5,000, again goods made specifically to the requirements of Rhodesia Railways, but sent c.i.f. Port Elizabeth under the same arrangement whereby they would be kept in bond, re-marked and re-consigned to Bulawayo, Stamcor taking its commission for services, but in form, as in the present case, the price would be paid by Rhodesia Railways to Stamcor, and Stamcor would pay the appellants. In fact all those contracts were carried through; all the goods in fact reached Rhodesia Railways and the appellants were paid, but what they were paid was South African rands and not hard currency.

The question therefore narrows itself to this: was Port Elizabeth the destination or ultimate destination, in which case the appellants were perfectly entitled to receive South African rands; or is the true view that the destination or ultimate destination was Rhodesia, in which case it is quite clear that they have been guilty of a breach of the prohibition against exporting goods to Rhodesia otherwise than for hard currency in advance? As I have said, both the stipendiary magistrate and the recorder held that the offences in each case were made out. I should say that the contentions which have been elaborated before this court were set out very concisely in the Case Stated, where it states:

"It was contended before me by the appellants that no offence had been committed by them in relation to any of the said goods on the grounds: (a) that on the true construction of Sections 23 (1) and 23 (4) of the Exchange Control Act 1947, the 'ultimate destination' within the meaning of those sections of goods exported, is the ultimate destination to which the exporter of those goods has contracted to deliver those goods, and (b) that on the facts hereinbefore set out, and on the true construction of the said Sections 23 (1) and 23 (4) of the Exchange Control Act 1947, the destination, and the ultimate destination, of all the said goods exported by the appellants, was Port Elizabeth in the Republic of South Africa."

The recorder found insofar as it was a question of fact, and in my judgment it is largely a question of fact, that the ultimate destination here was Bulawayo, Rhodesia. The real question as I see it in those circumstances is whether, as counsel for the appellants alleges, the recorder has misdirected himself in law. Despite counsel's able argument, I do not propose to go through all the details of his submission. It can be put in a great number of ways, but quite shortly as I understand it what he says is this, that when one is seeking to discover the

ultimate destination of any export, one does so by identifying the customer to whom the goods have been sold, in other words one looks at the strict contractual position, and that gives one the contractual destination, and that is all one is concerned with. It is not perhaps unfair to say that he would read for the word "destination" in s. 23 (1), "a purchaser"—"the exportation of goods of any class or description from the United Kingdom to a [purchaser] in any such territory", and I suppose it would follow that in sub-s. (4) he would read "ultimate destination" as "ultimate purchaser".

It seems to me quite clear that "destination" means a geographical place or country and is not concerned with a purchaser. But on any view it seems to me that it is quite impossible to confine the considerations to what I may call the strict contractual position. Counsel for the appellants does not shrink from this at all. He gave us an illustration only this morning that if, for instance, a customer in Gibraltar, part of the sterling area, ordered goods from the appellants, and having resold them on to a Spanish company in Madrid, then for convenience asked the appellants to ship the goods direct to Madrid, he would say that the fact that they are going and are clearly exported to Madrid as a place, is neither here nor there. He is forced to say: one looks to see what is the place where the purchaser is who is going to pay, and if the purchaser in that case is in Gibraltar, there is an end of the matter. As he would say, the exchange control provisions in this country do not, as is quite clear, operate extra territorially, and what this country depends on is the merchant in the sterling area in turn playing the game according to that country's exchange regulations. He would say that is another reason for confining the considerations solely to the contract, and the purchaser. I confess that even if one did look at what can be spoken of generally as the contractual destination, I am by no means clear in my own mind that the destination in regard to the first seven contracts was not quite clearly Bulawayo; but it is unnecessary to come to that conclusion, and indeed the commissioners do not put it that way. They rely on the words "ultimate destination". Counsel for the appellants, so far as "ultimate destination" is concerned, confines the discovery of the ultimate destination to the contractual position. He would say that the contract here quite clearly is a contract with Stameor for export c.i.f. Port Elizabeth, and that nothing that happens thereafter is part of the journey; the journey has ended. He goes further and says there is no test that can be laid down other than the one which he suggests that will really meet every case that should be met, and will not rope in cases which clearly ought not to be covered.

For my part I do not propose to lay down any clear tests. What it seems to me one is concerned to ascertain here is whether there was evidence on which the recorder properly directing himself as to the law could say that the ultimate destination here was Bulawayo, Rhodesia. It seems to me, having read all the correspondence and seen the arrangements made, it is a finding which is fully justified on the facts of this case. The whole object here, let alone intention or contemplation or anything less, of the transaction was that the goods should go to Bulawayo. The court has been referred to recent cases in this court, and in particular to *J. & J. Colman, Ltd. v. Comrs. of Customs and Excise* (1), where true the matter being considered was the words "consigned to". There goods had been shipped to Rotterdam or Antwerp from Canada for transshipment by coaster to England, and the question was whether the purchasers who were in England were entitled to Commonwealth preference. In that case LORD DENNING, M.R., approached the matter in this way. He said:

(1) [1968] 2 All E.R. 832.

"What is the meaning of the words 'consigned to'? That is the question. I endeavoured to answer it in *Gallagher, Ltd. v. Comrs. of Customs and Excise* (1). Applying what I there said, I think that goods are 'consigned to the United Kingdom from Canada' when they are delivered to a carrier in Canada for continuous transit to the United Kingdom. The sender must intend that they should go direct to the United Kingdom and not be taken into the commerce of any other country; and that intention must be realised."

Counsel for the appellants seeks to distinguish that case not only because of the subject-matter with which it was dealing, but because, he says, if one once begins to apply matters of intention in considering s. 23 of the Act of 1947, to put it generally, where does one end? No doubt there are cases where a general agent in a sterling area will buy goods, and it will be contemplated and even intended that he will sell in countries outside the sterling area. Counsel for the appellants would say: does every exporter in this country have to consider where the goods will ultimately end up, in other words where is the consumer; one ought to be confined solely to the customer who is buying them in the first instance. For my part I find it quite unnecessary to consider where the matter ends. As I have said, here the sole object was for these goods to get to Bulawayo, but I am far from saying that intention and possibly contemplation, may not be sufficient. It was never contemplated here and never intended here that the goods were to become part of the stock of South Africa; it was never intended that they should enter into the commerce of South Africa; they were in fact being sent on in bond, and in those circumstances it seems to me quite clear that there was no error in law in holding, as the recorder did, that Bulawayo was the ultimate destination. Indeed as it seems to me it accords with common sense on the facts of this case.

BLAIN, J.: The Exchange Control Act 1947 was passed to confer powers and to impose duties and restrictions affecting the monetary relationship between the United Kingdom and territories outside the sterling area. We were asked to consider its long title, and as that long title indicates, those powers, duties and restrictions concern a number of different matters. The matters include gold and currency which are dealt with in Part 1 of the Act; payments which are dealt with in Part 2 of the Act; securities which are dealt with in Part 3; and they include import and export of property which are dealt with in Part 4. This appeal is concerned with the export of locomotive components manufactured by the appellants in Britain and used by Rhodesia Railways, and Part 4 of the Act applies.

The facts and history of the matter so far as relevant have been summarised by LORD PARKER, C.J., and indeed I think are not in dispute. As is well known, on 11th November 1965 Mr. Ian Smith announced Rhodesia's unilateral declaration of independence, which resulted in the British Parliament's imposing sanctions by a series of steps which do not require further detailed analysis. For the purposes of this appeal, it is sufficient to say that as the result of those steps, by the time when the first of the alleged offences now in issue was committed, Parliament had imposed a complete ban on export to Rhodesia without Treasury sanction, and Rhodesia had ceased to be a part of the sterling area. The appeal is against ten convictions for exporting goods on dates between 24th March 1966 and 9th January 1967, goods the exportation of which it was alleged was prohibited by the terms of s. 23 (1) of the Exchange Control Act 1947, contrary to s. 56 (1) of the Customs and Excise Act 1952. So far as relevant, s. 23 (1) of the Exchange Control Act provides:

(1) [1968] 2 All E.R. 820; [1968] 2 Q.B. 674.

"The exportation of goods of any class or description from the United Kingdom to a destination in any such territory as may be prescribed is hereby prohibited..."

with certain exceptions. Subsection (4) provides:

"Any reference in this section to the destination of any goods includes a reference to the ultimate destination thereof."

Rhodesia, as I have said, had become a prescribed territory by the relevant dates, and none of the exceptions to the basic prohibition of s. 23 (1) applied. None of them applied when the ships in question left Mersey port. The relevance of that is that by definition to be found in s. 79 (3) of the Customs and Excise Act 1952, the act of exportation occurs when the ship leaves the last port in the sterling area, which in this case was Mersey port, so the sole question is whether the exportation was to Rhodesia as the commissioners alleged, and as both the learned stipendiary magistrate of Liverpool and the learned judge at the Crown Court at Liverpool found; or whether it was to a non-prescribed destination, to wit Port Elizabeth in South Africa. This involves the interpretation or definition of the term "destination" in the context of s. 23 of the Exchange Control Act 1947 and in relation to the facts as established by the evidence and history as a whole.

For my own part as I understand it the verb "to destine" normally is a transitive verb meaning "to ordain or fix the fate or function or state of some person or object" and the noun "destination" is either the purpose, or the geographical context, the place to which the person or object is destined to go. There can be no doubt that s. 23 has a geographical context when it uses that term "destination". That is quite clear because what it is dealing with is: export to a destination. To me it thus seems implicit in the use of the noun "destination", certainly in such a context as this that there must be an element of intent, if not necessarily an element of decision, though clearly the identity or role of a person whose mind has that intent may vary widely from one context to another. In the context of s. 23, one is dealing with exportation of goods to a destination, and to me the conclusion is inevitable that the relevant mind when considering intent is the mind of the exporter. Thus the court, as did the court below, has to consider what was the mind of the exporter, that is the appellants at the moment of exportation, that is at the time when the ship or series of ships left Mersey port.

Since 1942 the appellants had provided, to use a neutral term deliberately, components for use by Rhodesia Railways, and so far as some at least of those components were concerned, one knows not what proportion, designed to the specifications or drawings of Rhodesia Railways. For about the first 20 years they had done this mainly, not wholly, through their Johannesburg representative, in pursuance of an agreement made with that representative in 1942. For the next three or four years from 1962 onwards they had dealt largely, if not wholly, with Rhodesia Railways direct. When the difficulties consequent on U.D.I. arose, the appellants by perfectly genuine three-party arrangements with Rhodesia Railways and their representatives, Stone Stamoer (Proprietary), Ltd., sought to achieve a legitimate way of continuing their business to the mutual advantage of themselves and with Rhodesia Railways, and for that matter also no doubt Stamoer, without the need of Treasury agreement, or payment in advance in sterling. Their bona fides, as LORD PARKER, C.J., has said, are not in issue; the sole question is: have they succeeded in putting themselves outside the terms of s. 23 (1) of the Act?

The findings of the learned judge at the Crown Court are quite short. They include:

"As is apparent from documents 3 to 25 in the folder entitled 'Correspondence'... there was substituted for the previous procedure of dealing directly with Rhodesia Railways under which goods had been signed f.o.b. Mersey Port for Bulawayo, an arrangement with [Stamcor] that the orders for goods already placed referenced and identified would be cancelled and precisely similar orders similarly cross referenced would be placed by [STAMCOR] and consigned c.i.f. Port Elizabeth. It was known and understood as appears from Document No. 28 in the folder entitled 'Correspondence'... that goods sent to [Stamcor] were to be re-marked and re-consigned to Rhodesia Railways."

In my view there is ample, and more than ample evidence to justify those findings. I will quote three only of the letters in that correspondence, documents 20, 21 and 28. Document 20 is a letter from Stamcor to the appellants dated 29th December 1965, some six or seven weeks after U.D.I., headed "Rhodesia Railways" and reads:

"We wish to advise that we have been in touch with our Rhodesian agent in regard to shipment on a c.i.f. Port Elizabeth basis of material placed on order with you direct by the Rhodesia Railways. We have now received a letter from our agent advising that the Stores Controller of Rhodesia Railways would welcome the arrangement whereby shipment is made through us and payment made to us. We have been in touch with our clearing agents and we find that it is possible, without the production of an import permit, to forward on an 'in bond' basis material for Rhodesia. We will however have to submit at the time of clearing our own bank forms and certified invoices. Would you please therefore ship the material as covered by Rhodesia Railways' Orders 02921, 03032 and 03159 to us and advise us of your selling price to the Railways and also what commission on these orders we will be allowed."

I need not read the rest of that letter, but it was replied to in document 21 on 4th January 1966 by the appellants in these terms, under the heading "Rhodesia Railways":

"Thank you very much for your letter of the 29th December and we shall be pleased to ship the materials on the undermentioned orders c.i.f. Port Elizabeth. We will submit our invoices to you and indicate separately the freight and insurance charges. The orders in question are [four are enumerated. The letter concludes] We shall be obliged if you will kindly let us know, by return of post, the markings we are to use on the cases and we shall then make immediate arrangements for shipment."

The final document to which I would refer is the one referred to in the findings of the learned judge. It is dated 4th February 1966 and is a letter from Stamcor to the appellants headed "Re: Rhodesia Railways".

"We enclose herewith [eight indents which are numbered] covering the Rhodesia Railways requirements previously placed directly with you but now cancelled and re-ordered on us. We would ask that you ship all the material called for to Port Elizabeth and we will in turn have the cases re-marked and re-consigned to the Rhodesia Railways. Please ensure that shipping documents and certified invoices made out in our name be forwarded per Airmail as soon as shipment has been effected so that we may make arrangements to re-consign in bond to the Rhodesia Railways. The

orders that have been placed on us are based on your original quotations to the Rhodesia Railways and all charges from f.o.b. Mersey Port to Bulawayo will be for the Rhodesia Railways account."

Whatever be the form of the bills of lading and other documents, and whether the separate single contracts of sale be, as that correspondence might indicate, c.i.f., or whether really they be more in the nature of f.o.b. contracts or some hybrid combination of the two, for my part I have no doubt that on the evidence as a whole it was always the intention of the appellants at the moment of exportation that these goods should go from Mersey port to Port Elizabeth for direct onward transmission to Rhodesia Railways at Bulawayo. In those circumstances I regard Bulawayo as the destination; but even if there be doubt about that, the canons of construction would compel me to assume that the term "ultimate destination" deliberately introduced by Parliament in s. 23 (4) where there can be any difference, must mean something wider than the mere term "destination". What wider thing can it mean? It cannot mean some unknown final retailer/consumer quite unidentifiable by the exporter, and so I come back to the element of intent implicit in the verb "destined" and the noun "destination". The ultimate destination means the ultimate destination in the mind or intent of the exporter, and even if the plain term "destination" was not, as I believe it was, Bulawayo, then I have no doubt that the ultimate intention was Bulawayo. With those considerations in mind, and more particularly for the reasons given by LORD PARKER, C.J., I would dismiss this appeal.

DONALDSON, J.: I also would dismiss this appeal. Counsel for the appellants submits that the destination, and the ultimate destination of the goods was Port Elizabeth in the Republic of South Africa for two different reasons. First he points out that the Exchange Control Act 1947, as its name implies, is primarily concerned with foreign exchange. It follows, he submits, that the destination with which it is concerned is determined by the place of business of the export buyer, and the place from which payment is to be made. In the present case the export buyers were in South Africa, and payment was being made in South African currency. The destination of the goods was therefore, he says, South Africa. This submission is, I think, entirely fallacious. The Act of 1947 may well be concerned primarily with foreign exchange, but as has already been pointed out, it is also concerned with goods. Furthermore, whilst it is true that in the present case the goods were dispatched to the territory in which the export buyers carried on business and were paid for in the currency of that country, this is pure coincidence. The goods would have travelled the same route and been exported to the same ultimate destination, whatever that may have been, if the export buyers had carried on business in Hong Kong and the goods been paid for in New Zealand pounds.

Counsel for the appellants' second submission is that the ultimate destination of the goods for the purposes of the section must be related to and limited by the point in the transit at which the exporters' power to control influence or dispose of the goods comes to an end. This submission is based on the consideration that the exporter may well not know what the export buyer will eventually do with the goods, and where they will end up. In this case control ended when the goods reached Port Elizabeth. This submission is, I think, equally fallacious. The appellants' control, like that of any other c.i.f. seller, ended at the latest when they delivered the shipping documents to the buyers or their agents, and this usually occurs when the goods are still at sea. It would follow if that is what occurred in this case, that the ultimate destination was somewhere short of Port Elizabeth. In the case indeed of an f.o.b. export seller, control ceases

when the goods are shipped, so that if counsel is right, the ultimate destination of the goods for the purposes of the section in such a case is the place of shipment. This clearly is not right.

The section refers to both a destination and an ultimate destination. This conception of a destination and a different and final or ultimate destination is by no means unknown in the commercial world. Thus the Timber Trade Federation insurance clause contains, or did contain, an extension reading "Including risks of . . . non-delivery . . . until discharged at port of destination and whilst in transit . . . to final destination . . ." (See *G. H. Renton & Co., Ltd. v. Black Sea and Baltic General Insurance Co., Ltd.* (1).) Again if goods are shipped to a port of discharge for transshipment or for carriage by rail to the interior, the port of discharge may well be regarded as the immediate destination of the goods, and the place to which they are then carried as the ultimate destination. A somewhat similar problem arose in *J. & J. Colman, Ltd. v. Comrs. of Customs and Excise* (2), in the context of where the goods were confined to the United Kingdom from a place in the Commonwealth Preference Area for purposes of the Import Duties Act 1958. The goods had been bought c.i.f. Antwerp/Rotterdam, having been shipped in Vancouver, and Colmans, the c.i.f. buyers, had the goods transhipped on the continent to Norwich. It was held that as the goods were delivered to a carrier with the intention of continuous transit to England without being taken into the commerce of another country and that intention had been realised, they had been "consigned to the United Kingdom from Canada" within the meaning of s. 2 (2) of the Act of 1958 and qualified for Commonwealth preference.

Counsel for the commissioners submits that a similar test must be applied in the case of s. 23 of the Exchange Control Act 1947, and that one must identify the ultimate destination to which the exporter intended the goods to be exported. I think that "intention" may well be the test where the exporter is retaining ownership of the exported goods, and it would be sufficient to support the convictions in this case. However, in my judgment the true test is the destination "contemplated" rather than "intended" by the exporter, since an exporter who sells f.o.b. may often have no intention with regard to the goods, their ultimate or indeed their immediate destination being perhaps a matter of indifference to him, but he will certainly contemplate a destination to which the goods are being exported by him.

How "ultimate" is the destination to which the section refers must, I think, depend on the information available to the exporter. SALMON, L.J., in *Colman's* case (2) held that the place to which goods are consigned for the purposes of the Import Duties Act 1958 is a question of fact. So, too, in my judgment is the destination to which they are exported for the purposes of s. 23 of the Exchange Control Act 1947. Continuous transit, if contemplated by the exporter, is an important factor in deciding how remote is the ultimate destination from the point of exportation, and may often be decisive. However, I do not think that it is necessarily so. Suppose, for example, that an exporter arranged to send the goods to X and for them then to be imported, repacked and then sent on to Y by him. I think that it would be quite possible in such a case to reach the conclusion of fact that he was exporting the goods to the ultimate destination, Y. On the other hand, the mere fact that the exporter realised that the goods may one day reach Y does not make Y the ultimate destination to which they are being exported when he exports them from the United Kingdom. However,

(1) [1941] 1 All E.R. 149; [1941] 1 K.B. 206.

(2) [1968] 2 All E.R. 832.

that problem does not arise in the present case. The appellants always intended and contemplated that the goods would go to Southern Rhodesia as part of a continuous transit from the United Kingdom, being reconsigned in bond at Port Elizabeth. Accordingly I think that they were rightly convicted.

Appeal dismissed.

Solicitors: *Linklaters & Paines; Solicitor, Customs and Excise.*

T.R.F.B.

HOUSE OF LORDS

(LORD MORRIS OF BORTH-Y-GEST, LORD GUEST, LORD UPJOHN,
LORD WILBERFORCE AND LORD PEARSON)

March 11, 13, 17, 18, 19, May 6, 1969

COLESHILL AND DISTRICT INVESTMENT CO., LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER

Town and Country Planning—Development—"Engineering operation"—Demolition—Blast walls and embankments protecting magazines and explosives stores—Town and Country Planning Act, 1962, s. 12 (1).

The appellants acquired six buildings, four of which had been used during the war of 1939-45 as magazines and two as stores for explosives. Around each of them blast walls, about nine feet in height, had been erected, and against these walls there were substantial sloping embankments consisting of rubble and soil. In 1966 the appellants employed contractors to remove the walls and embankments as they would be unnecessary and inconvenient when the buildings were used for civilian purposes. The appellants had not obtained planning permission for this work, and the local planning authority served on them an enforcement notice, requiring them to discontinue their operations and restore the property to its prior condition. The respondent Minister dismissed an appeal by the appellants against the notice, holding that the walls and embankments were an integral part of each of the buildings and that their removal was an "engineering operation" within s. 12 (1) of the Town and Country Planning Act, 1962, and a material alteration of the buildings, and so was "development" within the meaning of the Act.

HELD: the decision of the Minister involved no error of law.

Decision of the Court of Appeal ((1967), 132 J.P. 203) affirmed.

APPEAL by Coleshill and District Investment Co., Ltd., from a decision of the Court of Appeal reported 132 J.P. 203, allowing the appeal of the second respondent, Meriden Rural District Council, from a decision of the Divisional Court, reported 132 J.P. 118, and restoring two decisions of the Minister of Housing and Local Government refusing to quash an enforcement notice served on the appellants in respect of their removing the embankments protecting disused ammunition stores and magazines and determining that planning permission was required for removing the blast walls.

Sir Derek Walker-Smith, Q.C., and S. Goldblatt for the appellants.

S. C. Silkin, Q.C., and Gordon Slynn for the Minister of Housing and Local Government.

Anthony Cripps, Q.C., and A. E. Holdsworth for the respondent council.

Their Lordships took time for consideration.

6th May. The following opinions were delivered.

LORD MORRIS OF BORTH-Y-GEST: One question that was persistently raised in this appeal was formulated as being whether demolition constitutes development for the purposes of the Town and Country Planning

Act 1962. Neat and arresting as the question so expressed may seem to be it is not in fact the direct question which calls for our decision. If someone propounded a question of comparable generality such as whether modernisation constitutes development someone else might ask for a ruling whether renovation constitutes development. No one of these enquiries has precision. If development needs permission, which in most cases it does, and if development is defined, as in the Act it is, the truth path of enquiry first involves ascertaining exactly what it is that it is desired to do or exactly what it is that has been done and then to see whether that comes within the statutory definition of development. Once some completed or projected work or operation is fully and clearly described then the words of definition can be applied. It is unnecessary and may be misleading to give the work or operation some single labelling word and then to try to apply the definition to that word. We are here concerned with actual operations and not with possible operations or with those which can for the future be imagined. Why, then, introduce and interpose some general word of description when precise words of description are at hand? Why gaze into the crystal when one can read the book?

The present case relates to certain structures which are on a site having an area of about $8\frac{1}{2}$ acres near Hampton-in-Arden. The structures themselves occupy about five acres. They consist of a number of buildings or magazines constituting, and during the last war used as, an ammunition depot. There are six separate buildings; four of them were magazines and two of them explosives stores. Around each one of them blast walls were erected which were about nine feet in height. Against these walls there were substantial sloping embankments consisting of rubble and brick and ash and soil. They extended from near the top of the walls to a distance of eight to ten feet from their base. They were all grass covered.

The War Department released the depot in 1958. In 1962 the Minister determined that user of the buildings for purposes of commercial storage (for which permission was then sought) would not constitute or involve development. In the early part of 1966 the appellants decided that they would like to remove the embankments and the walls which were felt to be unnecessary and a cause of inconvenience when the buildings were used for civilian purposes. So as a first step they set about removing the embankments. They instructed contractors to undertake the work. The contractors used a mechanical excavator. The material after being loaded into lorries (which the contractors hired from various firms) was transported away to be delivered at various different sites.

When those who lived in houses near to the depot saw the embankments were being removed they were aggrieved. The grass-grown or vegetation-covered green banks had blended with the countryside and had so camouflaged the depot as to screen the blast walls as well as much of the buildings from view. As the embankments were removed the buildings became starkly exposed and the general result, so the people felt, was that the whole place became an eye-sore which marred the locality and detracted from the amenity to be expected in a green belt. The result was that complaints were expressed to the respondent council, the Meriden Rural District Council, and following on them the clerk of the council wrote to the appellants pointing out that the operations being undertaken constituted development and that no application for planning permission had been made. An enforcement notice dated 30th March 1966, followed. The appellants were required to discontinue their operations and to restore the land to its prior condition. The appellants took the view that their operations did not constitute development and that no planning consent had

been needed. So they appealed against the enforcement notice. An inquiry before an inspector (pursuant to s. 46 of the Town and Country Planning Act 1962) was held on 8th December 1966. The inspector made a full report to the Minister dated 11th January 1967. The Minister gave his decision in a letter dated 16th May 1967. Subject to making certain variations, which do not now call for consideration, in the wording of the enforcement notice, the Minister upheld the notice and, refusing planning permission, dismissed the appeal. The appellants exercised (see s. 180 of the Act of 1962) their right to appeal to the High Court against the decision "on a point of law".

The appeal which, by a notice of motion dated 12th June 1967, they lodged was related also to the kindred question whether they could without planning permission take down the walls. The removal of the embankments had only been intended to be the first stage in the operation of completely removing the embankments and walls. So when the appellants were confronted with the question whether planning permission was needed to remove the embankments it was manifest that a similar question arose or would arise in regard to the walls. Pursuant to s. 43 of the Act they asked the respondent council, as the local planning authority, to determine that question. They so asked by a letter dated 4th July 1966. There was no determination within the prescribed time and accordingly the appellants appealed to the Minister. He gave his decision in a separate letter dated 16th May 1967. Other matters were involved but the only determination that is for present purposes relevant was that the removal of the walls would constitute or involve development and that planning permission was required. The appellants claiming to be "dissatisfied with the decision in point of law" (see s. 181) therefore appealed to the High Court on this issue also.

Though there was but the one local inquiry the facts relating to the whole site were fully and carefully set out in the inspector's report of 11th January 1967. The report was made a part of the Minister's first letter of decision on 16th May 1967. The report contained a description of the site and its surroundings: it set out the contentions of the appellants, of the respondent council, and of interested parties: it made specific findings of fact. I do not propose to refer to these in detail. Suffice it to say that it set out that the explosives stores which are brick built are each 25 to 30 feet long and about 12 feet wide: the magazines which are constructed of concrete are each about 70 feet long and about 30 feet wide and are about 11 feet rising to 13 feet high. Around, and about four feet away from each one of the buildings are the blast walls which are also constructed of concrete and are about nine feet high.

Having set out his findings of fact the inspector concluded that the legal implications from them were matters for consideration by the Minister and his legal advisers. He considered, however, that the embankments and blast walls were a necessary and integral part of buildings which constituted a magazine. He further thought that the work of removing embankments was an engineering operation constituting development, though he added that it could be regarded as demolition of part of the magazine "and planning permission is not required for demolition of a building". He recommended that if the Minister decided that development requiring planning permission was involved, such permission should not be granted.

The Minister had the issues fairly and fully placed before him for his decision. As regards the buildings the Minister considered whether the blast walls and the embankments were an integral part of each of the buildings. He concluded that they were. He said that they could not be regarded simply as means of

enclosures because they were erected as essential features of the structures which were erected. What had been built were magazines, and the inner buildings would have been ineffective in use without the walls and embankments.

Pausing there I cannot see how it can possibly be said that the Minister made a wrong decision on a point of law. In effect he was saying that the blast walls and embankments were an integral part of each of the buildings and could not be divorced from the internal buildings. The view might be held that his conclusion was not only one of fact but was on the evidence almost the inevitable one. There is, however, no need to consider whether or not that was so. It is enough to say that no error of law was involved.

The next part of the Minister's decision was that the removal of the embankments was an engineering operation and so was within the definition of development. He upheld the enforcement notice, refused planning permission and dismissed the appeal.

In the Minister's other decision, i.e., that relating to the appellants' application under s. 43, the first conclusion was again "accepted as a fact" that the blast walls formed part of the building. The further conclusion was that the removal of the blast walls would constitute an alteration of the buildings and one which would materially affect the external appearance of the buildings. The removal of the walls would constitute development requiring planning permission: such development was not within any of the classes set out in Pt. 1 of Sch. 1 to the Town and Country Planning General Development Order, 1963.

On appeal to the High Court the various grounds of appeal covered both the contention that neither what had been done nor what was proposed constituted development and also the contention that the embankments and walls were not part of the magazines. In allowing the appeal and setting aside the Minister's decision the Divisional Court took the view that the removal of the embankments could not be described either as a building operation or as an engineering operation; nor was it an operation of the scale, complexity and difficulty which would require a builder or an engineer or some mining expert. The view was held that the operation was a "simple removal of soil" or a "little job of shifting a few cubic yards of soil with a digger and a lorry" though it was said that earth moving on a grand scale requiring the intervention, supervision and planning of qualified engineers might well be an engineering operation. The Court of Appeal restored the order of the Minister and held that the operation of removing the embankments and also the operation of removing the walls constituted development.

As appears from the judgments in the Court of Appeal argument was in that court presented on behalf of the appellants to the effect that demolition of a building is not development and that no proper distinction can be drawn between demolition of a building and demolition of part of a building. Arguments to the like effect were fully and attractively developed on behalf of the appellants in support of their appeal in this House. Supported by a careful and painstaking analysis of very many sections in the Act of 1962 the contention was urged that throughout the Act there is a clear, consistent and logical distinction between demolition and alteration. The term "alteration" when used in the Act may sometimes denote development and sometimes corrective action: the term "demolition", on the other hand, so the argument ran, is not used in the Act as denoting development but is only used in the context of corrective action or in reference to procedures for the preservation of special buildings. It was contended that there are very many indications pointing to the conclusion that Parliament has deliberately excluded demolition (as opposed to alteration)

from the scope of planning control and from the concept of development. Thus, the need to protect certain buildings (such as those of historic or architectural interest) from demolition is met by special provisions. I do no more than summarise some of the steps in a very carefully constructed argument. If the contention is once accepted that demolition is not development then further steps (or jumps) in the argument run as follows: removal of the embankments or of the walls is demolition: demolition is not development: therefore, the removals are not development. Alternatively, even if the embankments and walls were parts of the buildings, since, by the definition section (s. 221), a part of a building is a building, each removal of an embankment or of a wall is removal of a building: but as removal is demolition and as demolition is not development the result is that there was not and would not be any development.

My Lords, these arguments, however persuasive, must not compel a diversion from the facts as ascertained and from the statutory terms as defined. It was for the Minister to make certain decisions. The appeals to the High Court from his decisions are only on points of law. I have already expressed the view that it is quite impossible to assert that there was an invalidity in law in the findings of the Minister to the effect that the embankments and walls were integral parts of each of the buildings. It is next necessary to consider his findings relating (a) to the removal of the embankments, and (b) to the desired removal of the walls.

The definition of "development" is set out in s. 12 (1) and s. 221 of the Act. Subject to certain exceptions, and leaving aside the making of any material change in the use of any buildings or other land, "development" means the carrying out of building operations (which include rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder) or of engineering operations (which include the formation or laying out of means of access to highways) or of mining operations or of other operations in, on, over or under land. "Land" means any corporeal hereditament, including a building (which includes any structure or erection, and any part of a building so defined but not including plant or machinery comprised in a building). "Erection" in relation to buildings includes extension, alteration and re-erection. Wide though the definition is, it does not include any and every operation on land. In s. 43 is set out the procedure to be followed when it is desired to have a determination whether planning permission is required. Any person who proposes to carry out "any operations" on land may apply for a ruling. Had development meant "any" operations in, on, over or under land there would not have been included in s. 12 (1) the words "building, engineering, mining or other". I think that the word "other" must denote operations which could be spoken of in the context of or in association with or as being in the nature of or as having relation to building operations or engineering operations or mining operations.

It was submitted, on the one hand, that the underlying conception of development is that of change. A rival submission was that the conception is that of positive construction. Another submission was that everything is development which is within the framework of what a "developer" (whoever so anonymous and elusive a person might be) would understand as being development. My Lords, as Parliament has denoted what is meant by development I do not think that we should be tempted to enlarge on or to depart from the statutory definition. It may well be that some operations which could conveniently be called demolition would not come within that definition. But we must not decide hypothetical cases. Here we have actual facts and findings. The Minister had a careful report before him. No suggestion has been made that the procedure deviated

from that which is laid down in the Town and Country Planning (Inquiries Procedure) Rules, 1965. The question that now arises is whether the Minister erred in law. He decided that the removal of the embankments was an engineering operation clearly falling within s. 12 (1) of the Act. He had certain primary facts found for him by the inspector. He did not differ from them. His conclusion from them was one that he could reasonably and properly make. It was really a conclusion of fact, and I can see no trace of any error of law. It was contended that the Minister was giving a wider meaning to "engineering" than it could in accepted or current use bear. I cannot accept this. The findings relating to the dimensions of the various embankments show that the task of their removal was one of some magnitude. I do not think that it can be said that the Minister erred in law in coming to the conclusion that their removal was an engineering operation.

Similar considerations apply to the Minister's decision that the removal of the blast walls would constitute or involve development and that planning permission for their removal was required. I think that it is inherent in the Minister's decision that the operation of pulling down the concrete walls (which were an integral part of the various buildings) would involve structural alterations to buildings and would therefore constitute development within the statutory definition. He then proceeded to consider s. 12 (2). That subsection does not enlarge sub-s. (1); but if an operation is covered by sub-s. (1) it may be taken out of the definition of "development" by sub-s. (2). The Minister was, I think, amply warranted in deciding that the alterations of the buildings which would result from taking down the walls would materially affect the external appearance of the buildings. No error of law is revealed.

In my view the Court of Appeal came to the correct conclusion. I would dismiss the appeal.

LORD GUEST: Prior to 1939 the War Department constructed an ammunition depot near the village of Hampton-in-Arden in Warwickshire. It consisted of four magazines, some 70 feet by 30 feet, and two explosives stores, 25 to 30 feet by 12 feet. Each of the buildings was about 11 to 13 feet high. Around each of the six buildings there were blast walls about nine feet high and standing about four feet out from the outside walls of the stores and magazines. Against the walls on their outer sides there were embankments consisting of bricks, rubble and soil which extended from near the top of the walls to a distance of eight to ten feet from their base. After the war the use of the ammunition depot was discontinued. It was released by the War Department in 1958 and the freehold was acquired by the appellants in 1964. The buildings have, by a decision of the responsible Minister, an existing storage use. The appellants were minded to make use of the buildings for this purpose. The embankments were covered with grass and weeds which concealed the unsightly nature of the walls and to some extent obscured the stores and magazines.

The question in the appeal is whether the removal of the embankments and the blast walls constitutes "development" within the meaning of s. 12 (1) of the Town and Country Planning Act 1962. The question of the embankment arises in consequence of an appeal by the appellants to the Minister against an enforcement order served on them by the respondent council under s. 45 of the Act of 1962: the question of the blast walls arises from an appeal by the appellants against a determination by the Minister under s. 43 of the Act that their removal required planning permission.

Section 12 of the Town and Country Planning Act, 1962, provides *inter alia* as follows:

"(1) In this Act... 'development', subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

"(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:—
(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works... which do not materially affect the external appearance of the building..."

Section 221 (1) of the Act provides:

"In this Act... the following expressions have the meanings hereby assigned to them respectively, that is to say:...'building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building:...'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder;...'engineering operations' includes the formation or laying out of means of access to highways;..."

The Minister treated the two cases differently. In the case of the embankment the Minister decided that the operation of removing the earth was an "engineering operation" within the meaning of s. 12 (1) of the Act as defined in s. 221 (1). Whereas in regard to the proposed removal of the blast walls the Minister decided that this operation was a "building operation" under s. 12 (1), as consisting of the removal of part of a building—the blast wall being part of the composite building constituted by the magazine building and blast walls and, as such, was a development requiring planning permission.

The courts below have approached the questions from different angles. WIDGERY, J., gave the judgment of the Divisional Court in which he expressed (8) the view that it was unnecessary to decide the "fascinating problem [of planning law] whether demolition of a building is a building operation" within s. 12 (1). He decided that the scale of operations in question—"this little job of shifting a few cubic yards of soil with a digger and a lorry" as he described them—could not be dignified by any of the qualifying words in s. 12 (1). He also referred with approval to an observation of LORD PARKER, C.J., in *Cheshire County Council v. Woodward* (1), where he said that the operations contemplated by the section must change the physical character of the land. But the underlying principle of the decision appears to be that *de minimis non curat lex*.

The Court of Appeal reversed the decision of the Divisional Court. LORD DENNING, M.R., with whom DIPLOCK, L.J., concurred, treated the structure consisting of magazine or store, blast walls and embankment as a composite building and, applying the terms of s. 12 (2) (a), held that the operations constituted an alteration to the building which affected its external appearance. It was thus "development" within the terms of s. 12 (1). LORD DENNING, M.R., however, said that it might be that if the whole building was demolished it might not be "development". SALMON, L.J., also declined to decide the question whether the total demolition of a building would amount to "development", although he would appear to think that it would. He also treated the whole unit as a composite building.

The appeal from the Minister's decision to the High Court is only on a question of law (see s. 180 and s. 181 of the Act of 1962). The question, accordingly, is

(1) 126 J.P. 186; [1962] 1 All E.R. 517; [1962] 2 Q.B. 126.

whether it has been shown to the satisfaction of the court that the Minister has erred in law in arriving at his decision.

Counsel for the appellants urged on your Lordships as his primary submission that any demolition of a building or part of a building by itself not involving reconstruction or replacement could in no circumstances amount to "development" within the Act. He argued that the "other operations in, on, over or under land" in s. 12 (1) must be construed ejusdem generis with the preceding categories of operations, namely, building, engineering and mining. The genus was the positive or constructional side of operations, and—as demolition was of a negative or destructive character "demolition per se", as he described it, could never come within this genus. He also referred to other sections in the Act of 1962 where he said that a distinction was drawn between "alteration", which was development, and "removal" or "demolition" which was not. I am unable to find that any help can be obtained from these sections which would assist his argument. I find it difficult to discover any common genus to building, engineering or mining operations. I am certainly unable to detect a positive or constructional genus in s. 12 (1); "mining operations" are not constructive because the surface of the land is destroyed in the course of the operations.

Reference was also made to the Town and Country Planning General Development Order 1963, in which by Sch. 1 certain development is permitted without the necessity of obtaining planning permission under the Act. Under Class 1 of Pt. 1 of Sch. 1 certain activities of a minor character in relation to a dwelling-house are permitted. It was said that if demolition was comprehended by "development", one would have expected to find certain exemptions in this order. Otherwise every minor demolition, say of a garden wall of a private house, would require planning permission. The reasons for the omission of minor demolitions from the general development order are obscure, but it may stem from the ministerial circular no. 67 of 15th February 1949, in which it was stated that the Minister was advised that demolition of a building did not, of itself, involve development. However this may be, the general development order affords no guide to the construction of s. 12 (1). I am not, therefore, able to accept the appellants' argument that demolition can never be development.

The question appears to me to be whether the operations in any particular case do or do not amount to development, having regard to the terms of s. 12 (1). I should, perhaps, say that I cannot find any aid to the construction of s. 12 (1) by reference to the terms of s. 12 (2) (a). The operation must first qualify as development within s. 12 (1). If it does, then the question arises whether, on the basis that it is development, it is excluded by s. 12 (2).

If this be the correct approach to s. 12 (1), for my part I do not find the answer in this appeal difficult. The question, as I have already indicated, is whether the Minister's decision betrays any error in law. First, as regards the embankment. The Minister had before him an inspector's report in which, after stating the relevant facts, he expressed his "conclusion" that the work of removal of the embankment was an engineering operation. The Minister followed his inspector's conclusion and held that it amounted to development. This decision was, in my view, a finding of fact in the sense that it was an inference from the primary facts as found by the Minister (see DENNING, L.J., in *British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority* (1)).

I am unable to say that the Minister erred in law in his decision or that it

(1) 113 J.P. 72; [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

was a conclusion which could not reasonably be drawn. It was peculiarly a matter within his competence to decide whether the removal of the embankment was an engineering operation. References were made to HUDSON ON BUILDING CONTRACTS (6th Edn.) at p. 8 and (9th Edn.) at pp. 64, 65, and to the definition of "engineering" in the OXFORD ENGLISH DICTIONARY, but the Minister had sufficient evidence, in my view, on which he could reach his decision unassisted by these references.

The next point concerns the removal of the blast walls. The Minister had before him the view of the local planning authority that "the blast walls . . . were all part of the original design of the buildings used for storing explosives and together they constitute a magazine". The Minister accepted this view, adding:

"It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure."

The Minister accordingly held that the blast walls formed part of the building and that their removal would materially affect the external appearance of the building and as such would constitute "development" within s. 12 (1). The appellants contended that as the blast walls were physically discontinuous from the magazines they could not in law form part of a *unum quid*. But in my opinion in considering this question it is legitimate to consider the functional test as well as the physical test. If they were built originally as an integral and necessary part of the building and at the same time as the magazines the fact that they are physically discontinuous does not, in my view, prevent them from being part of the building. There is, therefore, no ground on which the Minister's decision on either case can be disturbed.

I would dismiss the appeal.

LORD UPJOHN: I have had the opportunity of reading the speech about to be delivered by my noble and learned friend, LORD PEARSON, who has set out the relevant facts in the greatest detail so that I do not propose to cover that ground again.

There are two questions which must be answered before one can approach a consideration of the submissions of law that arise on s. 12 of the Town and Country Planning Act 1962 (the Act): 1. Was the Minister correct in holding that the walls and supporting earth embankments surrounding the magazine buildings all formed part of one building, or did these walls and embankments, which were not architecturally part of the magazine buildings but were designed and placed there to limit and so far as possible contain the result of some internal explosion and also to act as camouflage against enemy air attack, form different buildings for the purposes of the Act? 2. When these outer walls and supporting embankments were removed by the appellants, was the Minister correct in holding that this was an "engineering . . . operation" for the purposes of s. 12 (1) of the Act? While the enforcement notice under s. 45 of the Act applied in terms to removal only of the embankments supporting the walls because the walls themselves had not by then been removed, very sensibly neither party has taken any point on this.

My Lords, both these questions are largely matters of fact and inferences from facts and are questions of degree. On the first question, when the magazines and the protecting walls and embankments were built in 1938 and 1939 these latter were separate but an integral and necessary part, by accepted standards of those concerned with these matters, of the structure of a magazine to contain ammunition and explosives. But the role of the walls and embankments was

entirely functional. When the magazines ceased to hold these dangerous commodities and could be used for ordinary warehouse purposes without any change of user, it was obviously desirable, as a matter of reasonable everyday use, to remove these walls and embankments which made the former magazines ill lit, damp and inconvenient for everyday purposes. On the second question, on the evidence it does appear to me that the appellants used comparatively unsophisticated methods, bulldozers and so on, to remove these protecting walls and embankments.

On these two questions I must confess that my mind has fluctuated considerably. Both of them seem to me to be border-line questions and I think that the Minister might easily have come to a different conclusion on either or, indeed, both of them. Where a case depends on primary facts the court, it is clear, will hardly ever interfere with the findings of the trial judge unless satisfied that he has misdirected himself; but where the true conclusion depends not so much on the primary facts which (as in this case) are not in issue but on the inferences to be drawn from those facts the appellate court is less reluctant to interfere, but the degree of its reluctance must depend on the inferences. DENNING, L.J., in the Court of Appeal, put the matter succinctly in *British Launderers' Research Association v. Central Middlesex Assessment Committee and Hendon Rating Authority* (1), when he said:

"On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and in so far as those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley* (2)."

DENNING, L.J., then went on to discuss the type of case where the correct conclusion required for its correctness its determination by a trained lawyer, which most emphatically this case is not.

My Lords, the two questions which I have adumbrated above are so much a question of fact and degree which are within the particular knowledge and experience of the Minister and his advisers, and on which members of an appellate court have, in the absence of expert evidence (and there was none) no like knowledge or experience that, notwithstanding my doubts, I am not prepared to say that the Minister reached a wrong answer to either of these fundamental questions. It is, I think, a great pity that there was no expert evidence on the second question, but the appellants preferred to rely on their legal point as to demolition. The question, then, is whether on those findings the Minister reached a wrong conclusion of law in deciding that the removal of these walls and embankments constituted development as defined in s. 12 (1) of the Act (which it is common ground did not materially differ from its precursor in the Town and Country Planning Act 1947). If he reached a conclusion which was not erroneous

(1) 113 J.P. 72; [1949] 1 All E.R. 21; [1949] 1 K.B. 462.

(2) 111 J.P. 131; [1947] 1 All E.R. 126; [1947] K.B. 349.

in point of law, your Lordships have no power to correct him. Section 12 (1) is in these terms:

"In this Act, except where the context otherwise requires, 'development', subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

The main submission of the appellants pushed to its ultimate length was that no act of demolition "per se" or "simpliciter" (whatever those qualifications mean—I think they were intended to mean without a view to redevelopment), whether of a complete building or of a part of a building, could in law constitute development for the purposes of s. 12. I cannot understand this argument pushed so far. Counsel for the appellants rightly pressed your Lordships with the view that in the Act the word "demolition" was only used in relation to cases where corrective action was required after service of enforcement notices or in relation to specially "listed" houses of historical interest which may not be demolished without a special order. But there is nothing in s. 12 or elsewhere which makes it plain that demolition per se or simpliciter is necessarily excluded from the very wide words of s. 12 (1) if otherwise the relevant operation fits within those words as a plain matter of the use of the English language. In fact there is nothing to exclude demolition. In this case the Minister has decided that this demolition is an engineering operation and so within the section. I do not understand how, if this demolition be properly so described, the fact that it is only demolition per se takes it out of that section.

But on the Minister's finding, consequent on his finding that the magazine and its protective walls and embankments were all part of one building, so that this was only demolition of part of a building, there is, I think, another answer to the appellants.

Section 12 (2) is, so far as relevant, in these terms:

"The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:—
(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage;
..."

It was argued that one cannot look at sub-s. (2), which was a clause of exclusion, to construe sub-s. (1). This, however, states the principle too broadly. One cannot look at a clause of exclusion to extend the natural construction of the main section but one can, in my opinion, most certainly look at it to support the view which one may tentatively form as to the meaning of the main section. Subsection (2) only confirms the view which, assisted by the definition of "building" and "building operations" in s. 221 (1), in my view sub-s. (1) naturally bears, namely, that a building operation in, on, over or under land includes an alteration to a building which would include mere demolition; the subsection, however, makes it clear that to fall within sub-s. (1) an alteration is limited to a building operation which materially affects the external appearance of the building. There is nothing to exclude an alteration which is no more than demolition per se. As it is not in doubt that the removal of the walls and embankments affected materially the external appearance of the building (that was,

indeed, the real ground of complaint by the inhabitants) that seems to be another ground on which the decision of the Minister must be upheld.

In these circumstances it does not seem to me that the question whether demolition *per se* or *simpliciter* is a development within s. 12 (1) calls for determination by your Lordships. All that it is necessary to decide is that, if such demolition is covered, as in this case, by other provisions of that subsection, it is not saved from the application thereof merely by reason of the fact that it is only demolition *per se* or *simpliciter*.

The expression of opinion by the Minister on the question of demolition in his circular no. 67 dated 15th February 1949, has stood and has apparently been accepted by the profession for 20 years and there may be much common sense and practical utility in it. I do not criticise it but, in my view, it remains a matter of ministerial opinion and practice and its legal correctness does not arise in your Lordships' decision. For these reasons I would dismiss this appeal.

LORD WILBERFORCE: I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, LORD PEARSON. I gratefully adopt his statement of the history and the facts of this case: I agree with his conclusions with regard to them and to the findings and decisions of the Minister. I desire only to add some observations as to the scope of the Town and Country Planning Act 1962, and the concept of development.

"Development" is a key word in the planners' vocabulary but it is one whose meaning has evolved and is still evolving. It is impossible to ascribe to it any certain dictionary meaning, and difficult to analyse it accurately from the statutory definition.

In the Town and Country Planning Act 1932, we find this:

Section 52. "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:— . . . 'Building operations' includes any road works preliminary, or incidental, to the erection of buildings; . . . 'Development', in relation to any land, includes any building operations or rebuilding operations, and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used: . . ."

Leaving aside the inaccuracy of using an inclusive formula to express the meaning assigned, "development" here was used, in relation to operations, in a normal sense to refer to those which in their nature are constructive. It would have been difficult to argue under this Act that an operation involving mere demolition of a building, or part of a building, constituted development and I think that the view that it did not was assumed, if not decided, in *London County Council v. Marks & Spencer, Ltd.* (1).

In the Town and Country Planning Act 1947, the conception of development was greatly expanded. The relevant s. 12 (2), was in the same form as s. 12 (1) of the Act of 1962. The main changes, as compared with the Act of 1932, were that it was drafted in a "means" not "includes" form and that the operations referred to became "building, engineering, mining or other operations in, on, over or under land". Then there were six stated exceptions of operations or uses which were not to be deemed to involve development, of which the most important for the purposes of this appeal is—

"(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building."

(1) 117 J.P. 261; [1953] 1 All E.R. 1095; [1953] A.C. 535.

This definition was amplified in s. 119 (corresponding to s. 221 of the Act of 1962) by definitions of "building", "building or works", and "building operations" which I need not quote.

It is relevant, I think, to recall that the Act of 1947 in Part 7 provided for the levying of development charges in respect broadly of any development for which planning permission was required. But there was an exemption from these charges (by Sch. 3) of specified types of development, one of which was "the enlargement, improvement or other alteration" of certain buildings. No mention was made, in the exemptions, of any demolition, total or partial, of any building, yet had demolition been considered to be, or possibly to be, developments such a mention would surely have been included. The development charge provisions are not repeated in the Act of 1962, but it is still legitimate to look back to that of 1947 in construing the definition of "development". It is on the definitions now contained in s. 12 (1) and s. 221 of the Act of 1962 that the appellants seek an answer to the question whether demolition or, as the appellants call it, demolition *per se*, can constitute development.

Unfortunately I do not think that the question in this form can be answered because neither in the terminology of the Act, nor in its discernible policy as regards development, is it possible to segregate some identifiable operation, for which the description or label "demolition" is apt and to say of it that it does or does not amount to development under the Act. References, indeed, appear, in various contexts, as, for example, in the sections of the Act dealing with listed buildings, or in those which contain enforcement provisions, to demolition, removal, restoration or re-instatement, but these bear meanings which, while appropriate for their subject-matter, carry no consistent implications as regards the meaning of expressions in other contexts. The Act seems to be drafted empirically rather than logically. One must start with s. 12. It is not easy to construe, and certain negative propositions are easier to state than positive.

1. I think it is clear that the exception stated in s. 12 (2) (a) cannot be used to establish the meaning of "development" in s. 12 (1). Though I endorse the result of the judgments in the Court of Appeal, I cannot agree with passages in the judgments which extract from s. 12 (2) (a) the words "materially affect the external appearance of the building", say that the works in question do this, and so conclude that they are development within the meaning of s. 12 (1). Qualifying words in an exception cannot be introduced into the rule so as to enlarge the scope of the rule: so, if an operation is not one of the kinds included in s. 12 (1) it cannot be made into one merely because a condition of exemption is not complied with. Relevantly, if demolition is not included in s. 12 (1), there is nothing for the exemption in s. 12 (2) (a) to bite on and the question whether the external appearance is affected has no relevance or application. What is development must be ascertained from s. 12 (1) aided by s. 221.

2. I do not find it possible to identify a genus in the words "building, engineering, mining or other operations". It is hardly good enough, when the Minister's decision is being reviewed for error of law, to say that "other operations" must be construed *eiusdem generis*: that the genus need not be defined in detail, but that it includes only operations of a certain scale. I agree with the Court of Appeal and your Lordships in thinking both that this is not an adequate test (if it is a test at all) of the genus and that in any event it led the Divisional Court to the wrong result. No more satisfactory was the test suggested by the Minister who said that the genus was identified by the word "development"—a word which he claimed everyone understands. But

since the task on which we are engaged is to ascertain what "development", as defined, means, it hardly seems possible to interpret the words by which "development" is defined by reference to the, *ex hypothesi*, unknown meaning which "development" bears. Such a process is one of levitation by intellectual bootstrap.

Finally, there is the appellants' suggestion that the relevant operations must at least be of a constructive character, leading to an identifiable and positive result. I think that this is near the heart of the matter, and that there is an important element of truth in the argument. I would accept, and think it important to emphasise, that the planning legislation should be approached with a disposition not to bring within its ambit, unless specific words so require, operations in relation to land which do not produce results of this kind, that is to say, results (I deal only with operations, not with use) of a positive, constructive, identifiable character. In my opinion, the appellants succeed in showing that neither the development of the legislation, nor the successive descriptions of "development", nor the policy of control and, while it lasted, of charge on development, nor common sense or common expectation, require or suggest that the mere removal of a structure, or a building, or of a part of a building should be subject to the code. And I think that they derive important support for this argument from the Minister's circular no. 67 of 15th February 1949, in which he stated that he was—

"advised that the demolition of a building does not of itself involve development, although, of course, it may form part of a building operation, or lead to the making of a material change in the use of the land upon which it stood."

The advice referred to may not have been quite correct (I return to this point) but in giving this information to planning authorities, the Minister was undoubtedly reflecting a common-sense and accepted opinion as to the general nature of development. I accept, of course, that, as an interpretation of the Act of 1947, under which it was issued, the circular has no legal status, but it acquired vitality and strength when, through the years, it passed, as it certainly did, into planning practice and textbooks, was acted on, as it certainly was, in planning decisions, and when the Act of 1962 (and I may add the Town and Country Planning Act 1968) maintained the same definition of "development" under which it was issued.

So far, for the appellants, so good: they establish, in my opinion, this general approach to the construction of "development" and I think that it assists them in the limitation of the words "other operations". But, as I said above, this can only be so unless specific words so require. The governing statutory words remain those of s. 12 and s. 221, and where these fairly apply, they must prevail. They cannot be prevented from applying to a particular operation, which comes within them, by the mere fact that, in addition, the descriptive label "demolition" would fit that operation.

The Minister's circular to be fully accurate, should then have said not that it (the demolition of a building) may form part of a building operation, but that, what might be described as demolition may fall within one of the specific types of operation described in s. 12 (1) and rank as development accordingly.

The Minister has held here that the removal of the embankments was an engineering operation, and that removal of the walls would be a building operation. Neither of these conclusions appears to me to have been inevitable; he might have held that both or either would be demolition and that neither the one fell under "engineering" nor the other under "building". But both were marginal

decisions given in relation to a very special case, and I think were open to him to make as he did. The Act, in general, as the subject-matter probably requires, is drafted with a wide mesh; its use of expressions, particularly those relating to building, demolition, alteration and the reverse of these operations, is not precise or consistent—as to engineering or mining there is no definition at all—and the sections conferring power of decision on the Minister, in particular s. 43, show that decisions on marginal questions as to development—what it is and what it is not—are intended to be left to him through or with his expert and professional staff. I am of opinion that the decisions he reached were within his permitted field and were not wrong in law. This leads to the conclusion that the appeal must be dismissed.

LORD PEARSON: This appeal relates to a group of six buildings near Meriden, which is a village in the countryside between Birmingham and Coventry and about nine miles from each. These buildings were constructed in 1938 or 1939 as magazines, two for the storage of explosives and four for the storage of ammunition. Each consisted of a central block, surrounding blast walls about four feet away from the central block and sloping embankments extending outwards for about eight to ten feet from near the top of the blast walls to ground level. The two magazines for explosives were made of brick, and each of them was about 25 to 30 feet long, 12 feet wide and 11 feet high, and had a narrow entrance at each end. The four magazines for ammunition were made of concrete and each of them was about 70 feet long, 30 feet wide and 11 feet high rising to 13 feet at the roofs' centres and had two narrow entrances at each end, and at the sides had windows with their tops about level with the tops of the blast walls. The embankments consisted partly of soil and partly of ash and brick rubble, and the sloping surfaces were covered with vegetation.

In 1962 the Minister on appeal decided that the magazines possessed an existing use on the appointed day within Class X of the Town and Country Planning (Use Classes) Order 1950 [replaced by S.I. 1963, No. 708]. I understand that under s. 12 (2) (f) of the Town and Country Planning Act 1962, the effect of the Minister's decision was that use of the magazines for storage of any kind was permitted.

The magazines, however, were purpose-built. They had been specially designed and constructed for use as magazines for storing explosives and ammunition. The blast walls, supported by the embankments, would tend to confine the effect of any explosion that might occur. The embankments with their green vegetation tended to camouflage the group of buildings—the explosives and ammunition depot—against possible enemy air attack. Also the green embankments largely concealed the otherwise unsightly buildings from the view of local residents and passers-by. The magazines were not suitable for use as warehouses for general storage. The entrances were very narrow, being only about four feet wide and seven feet high and preventing loading and unloading of large-sized goods. The presence of the embankments made access to the roofs of the central blocks very easy, and intruders could break the windows and steal goods from inside. The blast walls kept light from the windows. There was dampness in the narrow passages between the central blocks and the blast walls.

The appellants acquired the group of buildings in 1964. Early in 1966, without having obtained planning permission, they set out to remove the embankments, demolish the blast walls and enlarge the entrances to the central blocks. The effect would have been to convert the purpose-built magazines into warehouses for general storage. But when they had removed, or begun to remove,

the embankments, there was local opposition on the ground that the ugly buildings were being exposed to view. On 30th March 1966, the respondent council, the Meriden Rural District Council, exercising planning control powers delegated to them by the Warwickshire County Council, served on the appellants an enforcement notice under s. 45 of the Act of 1962, describing the removal of the embankments as unauthorised development and requiring it to be discontinued and requiring steps to be taken to replace the embankments. The appellants, on 9th April 1966, appealed to the Minister against the enforcement notice. The appeal was initially under s. 46 (1) (d) of the Act, and later was under para. (c) also. Paragraph (c), so far as material, provides "that no planning permission was required in respect of that development". Paragraph (d) provides "that what is assumed in the enforcement notice to be development did not constitute or involve development". The enforcement notice and the appeal to the Minister against it related only to the embankments. The blast walls were still standing.

In July 1966, however, the appellants under s. 43 of the Act of 1962 applied to the respondent council for a determination whether in the opinion of the respondent council certain proposed works, including removal of the blast walls, would constitute development. In October 1966, under the provisions of s. 43 (2) and s. 23 and s. 24 of the Act of 1962, there was an appeal by the appellants to the Minister on the basis that the respondent council had not made a determination within the appropriate period. Thus, there were two appeals by the appellants to the Minister, one raising in relation to the enforcement notice the question whether the actual removal of the embankments was development requiring planning permission, and the other raising under s. 43 the question whether the proposed removal of the blast walls would be development requiring planning permission.

In December 1966, a Ministry inspector held an inquiry into the appeal relating to the enforcement notice and the removal of the embankments. The inspector's report, dated 11th January 1967, included a description of the appeal site and its surroundings, the gist of the representations made at the inquiry, and his findings of fact, conclusions and recommendations. Representations on behalf of the appellants were made by Mr. S. J. Williams, a director of the appellants. The report shows that he agreed in cross-examination—

"that the blast walls and soil embankments were probably an integral part when built, the embankments making the blast walls stronger and deadening blast effect, and that the blast walls were probably an integral part of the construction of a building which contained ammunition."

The inspector set out his findings of fact in his report and his conclusions, including the following:

"The legal implications of the above facts are matters for consideration by the Minister and his legal advisers, but it appears to me that:—
(i) Surrounding embankments and blast walls are a necessary and integral part of buildings used for storing explosives and together they constitute a magazine . . . Their appearance has been materially affected by the removal of the embankments, which work was an engineering operation constituting development . . . On the planning merits of the case I am of the opinion that the exposure of the concrete blast walls and buildings forming these magazines, by the removal of the grass and vegetation covered embankments, has resulted in these ugly structures being much more prominent in the rural surroundings. The quality of the countryside here, and its effectiveness as a

part of a proposed green belt, has accordingly deteriorated to an unacceptable extent . . ."

The inspector's recommendation was that: "If it is decided that development requiring planning permission is involved, planning permission be not granted."

In a letter of decision dated 16th May 1967, the Minister considered the representations made at the inquiry, and the inspector's findings of fact and conclusions and recommendations. In the course of the letter the Minister said:

"The [respondent] council maintained that the blast walls and the embankments were an integral part of each of the buildings. This latter view is accepted as the correct one in this case . . . The removal of the embankments was an engineering operation clearly falling into section 12 (1) of the Act. This operation constituted material development for which planning permission was required . . ."

The Minister upheld the enforcement notice, refused planning permission for the development to which it related (i.e., the actual removal of the embankments) and dismissed the appeal.

In the other appeal, that relating to the proposed removal of the blast walls, no inquiry was held but written representations were made to and considered by the Minister. In a second letter of decision dated 16th May 1967, the Minister dealt with this appeal. In the course of his letter he said:

"With regard to the removal of the walls, the [appellants] argued that the blast walls were separate from the storage units and that as they in no way afforded any support to the buildings their removal could not be said to affect the external appearance of the buildings and further that demolition of itself does not involve development. In the opinion of the [respondent council] the blast walls (and the earth banks which previously surrounded them) were all part of the original design of the buildings and their removal would therefore materially affect the external appearance of the buildings. It is noted that the buildings were erected shortly before the last war, some were used for the storage of ammunition and some for the storage of explosives. The blast walls and soil embankments were provided to prevent damage from explosion and to conceal the internal structure. The [respondent] council's view that the blast walls form part of the buildings is accepted as a fact and it is considered that the removal of the blast walls would therefore constitute an alteration of the buildings, and that it would materially affect the external appearance of the buildings. In these circumstances the provisions of section 12 (2) (a) of the Act do not apply to the proposal which therefore constitutes development of the land for which planning permission is required . . ."

The Minister determined accordingly and dismissed the appeal.

The appellants under s. 180 and s. 181 of the Act appealed to the High Court against both decisions of the Minister. The Queen's Bench Divisional Court allowed the appeal, deciding in favour of the appellants, but the Court of Appeal reversed that decision.

Under s. 180 and s. 181 of the Act an appeal to the High Court against a decision of the Minister can only be made on a point of law. There could be no such appeal against findings of primary facts. The Minister has, however, drawn inferences from the primary facts on the following important points which are in dispute: (i) he held that the blast walls and the embankments were integral parts of the magazines; (ii) he held in effect that the removal of the blast walls would be a structural alteration of the magazines and would

therefore constitute building operations as defined in the Act and (not being within s. 12 (2) (a)) would be development requiring planning permission; and (iii) he held that the removal of the embankments was an engineering operation within the meaning of the Act and so was development requiring planning permission.

These inferences involve an element of construction of the Act and, therefore, of law, and so are in principle appealable. But an appeal cannot succeed unless it is shown that there is some error of law. In dealing with questions of mixed fact and law, such as those which arise in this appeal, it should be borne in mind that the Minister, advised by his department, is likely to have the benefit of expert knowledge and experience of building and engineering matters.

(i) I cannot see that there is any error of law in the Minister's view, agreeing with that of the local authority and the inspector, that the blast walls and the embankments were integral parts of the magazines. He did not take into account any irrelevant factors or leave out of account any relevant factors, and it cannot be said that his view is manifestly wrong or unreasonable. The gap between the central block and the blast walls is quite small, but was duly taken into account. I think the character of the whole structure in each case as a purpose-built magazine is an important reason for treating it as a single unit (*unum quid* in the convenient Scottish phrase). If one takes away the blast walls and embankments you deprive the structure of its character as a magazine and convert it into a warehouse for general storage.

(ii) The second point requires consideration of s. 12 (1) and (2) (a) and the definitions of "building" and "building operations" in s. 221 (1). Section 12 (1) and (2) (a) provide as follows:

"12.—(1) In this Act, except where the context otherwise requires, 'development', subject to the following provisions of this section, means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

"(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land, that is to say:—
(a) the carrying out of works for the maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building and (in either case) are not works for making good war damage . . ."

The definitions of "building" and "building operations" in s. 221 are as follows:

"'building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building; . . .

"'building operations' includes rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder; "

Now as the whole magazine in each case has been treated as a *unum quid*, that is to say as a single building or structure or erection, the removal of its blast walls would very clearly constitute a structural alteration of it. The exception provided by s. 12 (2) (a) is not applicable because the removal of the blast walls would materially affect the external appearance of the building or structure or erection. Accordingly the Minister's decision under s. 43 with regard to the blast walls should be upheld.

(iii) Thirdly, there is the removal of the embankments. I would have been inclined to regard this also as a structural alteration of the magazine treated as a single building, structure or erection, and on that basis there would be a building operation within the definition and it would be development requiring planning permission. There is also the possibility that the removal of the embankments might come within "other operations normally undertaken by a person carrying on business as a builder", but without expert knowledge or expert evidence I do not feel able to form a view on this possibility. The Minister, however, did not decide on either of these grounds. He decided on the ground that the removal of the embankments was an "engineering operation". There is in the Act no definition of "engineering operation" except that the expression includes the formation or laying out of means of access to highways. In the Divisional Court *WIDGERY, J.*, with whom *LORD PARKER, C.J.*, and *CHAPMAN, J.*, concurred, said

"... this little job of shifting a few cubic yards of soil with a digger and a lorry is not, in my judgment, an operation of a kind which could ever be dignified with the title of an engineering operation."

If I were able to agree with the description of the operation on the facts of this case I would agree that it was not an engineering operation. But the evidence shows, to my mind, that the removal of the embankments from the six magazines of the sizes previously described was not "a little job of shifting a few cubic yards of soil". It was rather a large job. There were large quantities of soil and ash and brick rubble to be moved. The appellants, naturally, would, and in fact did, employ contractors to perform the operation. The materials did not only have to be moved; they also had to be disposed of. The contractors were Bencif (Construction), Ltd., Sports Ground and Tarmacadam Contractors, and they stated in a letter that they had hired transport from various firms, and that the content of the embankments was made up of one-third top-soil and sub-soil and two-thirds ash and brick rubble, and that the top-soil was delivered to the new incinerator site at Castle Bromwich, the ash and brick rubble to various sites, and the sub-soil to Barston. It was an operation of some magnitude. In my opinion, there was evidence on which the Minister could reasonably accept the view of the local authority and the inspector that the removal of the embankments constituted an engineering operation and, therefore, was development requiring planning permission.

The argument for the appellants was mainly based on the proposition that demolition, or demolition in or by itself, or demolition per se, does not constitute development. I think there is in this proposition some truth but only a limited amount of truth. On the one hand, there is in s. 12 and in the relevant definitions in s. 221 (1) no mention of or reference to demolition or removal or any such operation. Therefore, an operation does not qualify as development by virtue of being a demolition or removal operation. It is not right to say "This is a demolition or removal operation; therefore, it is development". On the other hand, there are not in s. 12 or in the relevant definitions in s. 221 (1) any words excluding operations from being development if they are demolition or removal operations. An operation is not disqualified for being development because it is a demolition or removal operation. It is not right to say "This is a demolition or removal operation, therefore, it cannot be development". Notwithstanding that an operation is a demolition or removal operation, one still has to see whether it comes within the scope of development as defined in s. 12 assisted by s. 221. It may be within the definition of "building operations", e.g., because it constitutes a structural alteration of a building or because it is such an operation

as to be normally undertaken by a person carrying on business as a builder. It may be an engineering operation. Whether it is or is not any of those things depends on the facts of the particular case.

The argument for the appellants also sought to apply the ejusdem generis rule to the words in s. 12 (1) "the carrying out of building, engineering, mining or other operations in, on, over or under land". It was contended that there must be one single genus comprising building, engineering and mining operations, and that the other operations must belong to this genus. It was further contended that the single genus was of positive, constructive operations and could not include any negative, destructive operations and, therefore, could not include any operations of demolition or removal. I think there is a first step which can properly be taken along this line of argument: the "other operations in, on, over or under land" must be in some way restricted by the juxtaposition of these words with the words "building, engineering, mining": if the "other operations" were any operations whatsoever in, on, under or over land, there would be no need to mention specifically building, engineering or mining; therefore, it is to be inferred that the draftsman or Parliament intended to deal primarily with building, engineering or mining operations but also intended secondarily to bring in some other operations similar to these specified operations or to some of them. This first step would be covered by the maxim *noscitur a sociis*. I doubt whether in construing this subsection—seeking the intention to be found in it—it is safe to say that there must be a single genus comprising building operations, engineering operations and mining operations and the other operations must be fitted into that genus. Another possible construction which can be suggested is that there are three genera and the other operations must be similar to building operations or to engineering operations or to mining operations. However this may be, I think the sufficient answer in this case is that if there is a single genus it cannot be of the kind suggested, because it has to include mining operations, when so far as they affect the land are not positive and constructive but negative and destructive operations. For instance, coal-mining demolishes and removes the seam of coal, leaving behind in the land a subterranean hole partly filled with waste and perhaps shored up but not having any utility and possibly causing disturbance and eventually subsidence of the upper strata. Secondly, there are operations which are both destructive and constructive. If a piece of ground is cleared of buildings and levelled for use as a sports ground or aerodrome, there is a destruction of the buildings and the mounds of earth but there is created the useful flat surface. In some circumstances it could be regarded as a positive and constructive operation.

In my opinion, the appellants' arguments cannot prevail. I would dismiss the appeal.

Appeal dismissed.

Solicitors: Keene, Marsland & Co., for Tompkins & Co., Birmingham; Solicitor, Ministry of Housing and Local Government; Sharpe, Pritchard & Co.

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON AND PHILLIMORE, L.JJ., AND CAULFIELD, J.)

March 3, 1969

R. v. CHAPMAN

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Specimen of blood—Breath test—Hospital patient—No objection by medical practitioner—Proof—Need to call medical practitioner—Road Safety Act, 1967 (c. 30), s. 2 (2), s. 3 (2) (a), (b).

Where a specimen of breath has been taken, under s. 3 (2) of the Road Safety Act, 1967, from a hospital patient, it is perfectly proper for the prosecution on a charge of driving with a blood-alcohol proportion above the prescribed limit, to call a police officer to give evidence that the medical practitioner in whose care was the patient was notified of the proposal to take the specimen and did not object. Objection or non-objection is a fact, and it is unnecessary to call the medical practitioner to state that he did not object.

APPEAL by David Chapman against his conviction at Teesside Quarter Sessions before the recorder of driving a motor vehicle with his blood-alcohol concentration above the prescribed limit contrary to s. 1 (1) of the Road Safety Act, 1967.

In the recorder's summing-up he directed the jury (a) that the appellant ought not to be convicted unless the requirement that he should provide a specimen for a laboratory test was made lawfully, in accordance with the conditions laid down in s. 2 and s. 3 of the Road Safety Act 1967; (b) that they ought not to find that the conditions contained in s. 3 (2) (a) of the Act were fulfilled unless they were satisfied, *inter alia*, that a breath test was carried out in the manner described by the police officers and that the result of the test was positive; (c) that if they were satisfied that the appellant used the breath test device in the manner which he described, and that he did so because he was incapable of filling the bag with a single breath and not because of any failure by the police officers to give him proper instructions, then he had failed to provide a specimen of breath for a breath test within the meaning of s. 3 (2) (b) of the Act.

R. A. R. Stroyan for the appellant.

F. J. Müller for the Crown.

FENTON ATKINSON, L.J. delivered the judgment of the court: On 5th August 1968 at Teesside Quarter Sessions before the learned recorder the appellant was convicted of driving a motor vehicle with a blood-alcohol concentration above the prescribed limit contrary to s. 1 of the Road Safety Act 1967, and he was fined £15 and disqualified for a modified period (the recorder finding certain special reasons). He now appeals against conviction on a certificate by the recorder with particular reference to the direction given to the jury on the meaning of the word "fails" in s. 3 (2) (b) of the Act.

In the early hours of the morning of 24th February 1968 the appellant, when driving his motor car, crashed into a tree on the offside of the road. He had admittedly been out drinking with his friends that night. He was apparently the one supposed to keep sufficiently sober to drive the others home. At 3.30 a.m. he dropped his last passenger, and thereafter, within about 20 yards, the accident happened when, according to him, possibly through a burst tyre, his car veered across the road and collided with a tree. He was found at about 6.45 a.m. by P.C. Dodd, who noticed his speech was indistinct and his breath smelt strongly of alcohol, and undoubtedly there was reasonable cause for the policeman to suspect him of having alcohol in his body. He was taken to hospital to the

casualty ward, and the duty casualty officer was a Dr. Din who was plainly the medical practitioner in the immediate charge of his case. At this stage Dr. Din was joined by a Sergeant Watson, and the unchallenged evidence was that Sergeant Watson notified Dr. Din that he proposed to require the appellant to provide a specimen of breath, and his evidence was that Dr. Din made no objection.

The first point that arises is under s. 2 (2) of the Act where it is provided that in a case like this at hospital—

“... a person shall not be required to provide [a breath specimen] while at a hospital as a patient if the medical practitioner in immediate charge of his case is not first notified of the proposal to make the requirement...”

Pausing there, there was clear evidence that Dr. Din was notified by the police of the proposal to make the requirement, and further evidence from them that when the requirement was made, Dr. Din examined the patient. The section then goes on—

“... objects to the provision of a specimen on the ground that its provision or the requirement to provide it would be prejudicial to the proper care or treatment of the patient”.

Counsel for the appellant's first point, and this point was taken in the court below, was this, that it was not open to the police to say: “We notified Dr. Din, he made an examination and raised no objection to the provision of the specimen.” It is said that that is hearsay, and it is necessary in such circumstances for the prosecution to call the doctor to prove affirmatively that he had no objection. In the view of this court that is a bad point. It was dealt with summarily when first raised, and in our view absolutely rightly by the recorder, who said that either Dr. Din objected which is a fact or he did not object. We would adopt a passage from PROFESSOR CROSS' work CROSS ON EVIDENCE (3rd Edn.) at p. 380 which seems to put the position exactly:

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made”.

What was to be established here was the fact that Dr. Din made no objection, and in our view it was perfectly proper for the police to give that evidence without Dr. Din being called. That is the first of the two points counsel for the appellant raises, and the court is against him on that. Then the matter went on and this breath test was taken. Sergeant Watson said that he told the appellant that he had reason to believe he had been involved in an accident and had alcohol in his body, and that he required a specimen of breath. The appellant said “Yes”, and the test was taken with an Alcotest device of the type approved by the Secretary of State, and his approval no doubt embraced the instructions of how the test is to be taken. Those instructions require a bag to be blown up in one breath by the person taking the test. The police evidence was that he did take the test, that with a proper Alcotest device he inflated it in one breath, taking a little over ten seconds, and the test was positive. The appellant's evidence, on the other hand, was to the effect that he tried to take the test, had three or four blows and finally inflated the bag, but for some reason had been unable to do it as the device required with one breath. That having been done, the police said they wished to take a sample of blood or urine. They again notified

Dr. Din, and their evidence was he made no objection. The specimen of blood was taken with the consent of the appellant, and that showed a concentration of 86 milligrammes of alcohol against the permitted 80.

The next point made by counsel for the appellant is that the condition preceding the taking of a laboratory specimen under s. 3 (2) of the Act is that a proper breath test has been taken first. Complaint is made of the summing-up of the learned recorder, who put it to the jury in effect in this way, "Well, if the police evidence is right, he took the test perfectly properly, he blew the bag up in one blow and it was positive", and that would clearly satisfy s. 3 (2) (a) of the Act. But, alternatively, said the recorder, "if you have any doubt about that, and it may be right [the appellant] took three or four blows before he could inflate the bag, then that would be a failure to take the test properly". The appellant would then be caught by s. 3 (2) (b), and in our view that was a perfectly proper direction, because if the police evidence is right, there was no doubt about it; the test was properly taken and the test was positive. But even if it was right that the appellant was unable to blow it up in one, and took three or four blows, then in our view it was perfectly right and proper to say he had failed to take the test in the manner prescribed, which requires it to be done in one blow. It was a clear case of guilt if the necessary preliminaries had been correctly gone through by the police officers. In our view, the evidence amply justified the conviction, the summing-up cannot be faulted and there is really nothing in this appeal, and the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; P. S. Ross, Middlesbrough.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND BLAIN, J.J.)

April 3, 4, 10, 1968

R. v. BRIXTON PRISON GOVERNOR. Ex parte AHSON AND OTHERS

Commonwealth Immigrant—Notice refusing admission—Examination by immigration officer—Whether within prescribed time limit—Proof of time of arrival—Where onus lies—Commonwealth Immigrants Act 1962 (10 & 11 Eliz. 2 c. 21), Sch. 1, para. 1 (2), para. 2 (3).

By para. 1 (2) of Sched. I to the Commonwealth Immigrants Act, 1962, an immigration officer is not empowered to require any person who lands or seeks to land in the United Kingdom to submit to an examination for the purpose of determining whether he is a Commonwealth citizen subject to control under Part I of the Act more than 24 hours after he has landed. By para. 2 (3) of Sch. I a notice refusing admission shall not be given to any person later than 12 hours after the conclusion of the examination.

On the morning of 10th February 1968, the applicants, who were British subjects under the British Nationality Act, 1948, and also Commonwealth citizens under the Commonwealth Immigrants Act, 1962, were found walking along a road near Banstead, Surrey. They were taken to Banstead police station and there examined by immigration officers. Within 12 hours of the examination each was served with a notice refusing him admission to this country and they were taken to Brixton Prison. In each case an immigration officer swore an affidavit that he was not satisfied that the applicant had arrived in this country more than 24 hours before he was examined. The applicants maintained that they had landed early in the

morning of 7th February and that on landing they had been taken to a house where they had lived for three days.

HELD (ASHWORTH, J., dissenting): once the validity of the examination was challenged by the applicants on the ground that a condition precedent to it had not been fulfilled, the onus rested on the prosecution to prove that the examination had taken place within 24 hours of the landing of the applicants in the United Kingdom.

MOTION by the applicants, 11 Pakistanis, Mohammad Ahson, Mohammad Asghr, Mahdi Khan, Fazal Dean, Slamati Ali, Nur Elahi, Mir Zaman, Himat Khan, Ghulam Ahmad, Fazal Hussain and Abdul Rehman, for the issue of writs of habeas corpus directed to the governor of Brixton Prison.

Quintin Hogg, Q.C., and I. Finstein for the applicants.

Gordon Slyn for the respondent.

Cur. adv. vult.

10th April 1968. The following judgments were read.

LORD PARKER, C.J.: The proceedings disclose a deplorable state of affairs. The applicants are all British subjects under the British Nationality Act, 1948, and also Commonwealth citizens for the purpose of the Commonwealth Immigrants Act 1962. They apparently left Pakistan, so it is said, some time in October 1967, and after extensive wanderings, some say via Teheran, they arrived in Europe, and eventually on the north coast of France. They were then smuggled by boat across the Channel, landing, probably wading ashore, some time in February 1968. On the way they appear to have been milked of all their money, some paying up to £200 for transport across the Channel, so that when they arrived here, they were for the most part penniless. They had undoubtedly made their way here to seek employment, and having no employment voucher, made a clandestine entry into the country.

On the morning of Saturday, 10th February 1968, the 11 applicants and an Indian were found trudging along a road near Banstead; they were gradually rounded up, as it were, and brought into Banstead police station for interrogation by police officers, and later examination by immigration officers. As a result, each of the applicants was served with a notice under the Act of 1962 refusing him entry into this country, and they were thereupon removed by a constable to Brixton Prison. In each case an immigration officer has stated on affidavit that he was not satisfied that the applicant in question had arrived in this country more than 24 hours before he was examined. The relevance of that can be seen from an examination of the Act itself, and I refer only to the sections relevant for this purpose.

Section 2 (1) of the Commonwealth Immigrants Act 1962, gives the immigration officer an absolute discretion, subject to the following subsections, as to whether he should admit a Commonwealth immigrant into this country or refuse his entry. It provides that:

"Subject to the following provisions of this section, an immigration officer may, on the examination under this Part of this Act of any Commonwealth citizen to whom s. 1 of this Act applies who enters or seeks to enter the United Kingdom,—(a) refuse him admission into the United Kingdom; or (b) admit him into the United Kingdom subject to a condition restricting the period for which he may remain there, with or without conditions for restricting his employment or occupation there".

Section 3 (1) provides that:

"The provisions of Part I of the First Schedule to this Act shall have effect with respect to—(a) the examination of persons landing or seeking



to land in the United Kingdom from ships and aircraft; . . . (d) the detention of any such persons or citizens as aforesaid pending further examination or pending removal from the United Kingdom . . . "

One turns then to Sch. 1 to the Act of 1962. Paragraph 1 provides that:

"(1) Subject to the provisions of this paragraph, an immigration officer may examine any person who lands or seeks to land in the United Kingdom for the purpose of ascertaining whether that person is or is not a Commonwealth citizen subject to control under Part I of this Act, and if so for the purpose of determining what action, if any, should be taken in his case under the said Part I . . .

"(2) A person shall not be required to submit to examination under this paragraph after the expiration of the period of twenty-four hours from the time when he lands in the United Kingdom unless, upon being examined within that period, he is required in writing by an immigration officer to submit to further examination."

Paragraph 2 of Sch. 1 to the Act of 1962 deals with the machinery:

"(1) The power of an immigration officer under section two of this Act to refuse admission into the United Kingdom or to admit into the United Kingdom subject to conditions shall be exercised by notice in writing . . .

"(3) Subject to the following provisions of this Schedule, a notice under this paragraph shall not be given to any person unless he has been examined in pursuance of paragraph 1 of this Schedule, and shall not be given to any person later than twelve hours after the conclusion of his examination (including any further examination) in pursuance of that paragraph."

Paragraph 3 (3) of Sch. 1 to the Act of 1962 provides that:

"No directions shall be given under this paragraph in respect of an immigrant after the expiration of two months beginning with the date on which he was refused admission into the United Kingdom."

Pausing there, it will be seen that a refusal must be given by a notice in writing, that the notice must be given not later than 12 hours after the conclusion of the examination, and the examination must take place within 24 hours of the immigrant landing. That much I think is conceded. Paragraph 4 (1) goes on to provide that:

"An immigrant who is . . . refused admission into the United Kingdom under section two of this Act, may be detained under the authority of an immigration officer or constable pending that further examination, or pending the giving of directions under paragraph 3 of this Schedule and pending removal in pursuance of such directions . . . "

Finally, going back to the Act itself, s. 13 provides that:

"(1) Any persons required or authorised to be detained under this Act may be detained in such places as the Secretary of State may direct . . .

"(4) Any person required or authorised by this Act to be detained may be arrested without warrant by a constable or an immigration officer; and any person who is detained by virtue of this Act, or is being removed in pursuance of this section, shall be deemed to be in legal custody."

The issue, accordingly, in the present case concerns the exact time at which the applicants landed in this country. They have, from the outset, maintained that they landed in the early hours of the morning of 7th February, in which case, when they were taken to Banstead police station, they had been in this

country more than 24 hours. They told stories which, in broad outline, were that on landing they had been taken to a house where they had lived for three days, except that on the first day they had gone to a café or restaurant in Brighton for a midday meal, and a man at that café has sworn an affidavit confirming that they were there at the restaurant on 7th February. Further one of the applicants maintains that he put a telephone call through to Altrincham and this is confirmed by a lady who says that she answered a call on 7th February. The story then went on that on 10th February they were taken away by a van which developed a puncture, as the result of which they got out and walked along a road until they were picked up by the police.

As a result, however, of their examination, the immigration officers concerned were not, as I have said, satisfied that the applicants had been in this country for more than 24 hours. The applicants undoubtedly told lies; some of them gave false names and addresses; their accounts differed in detail, some saying the house they had gone to was a white house; others a blue house; others that they had been wandering all the time, and so on. Apart from these lies and discrepancies, the immigration officers stated that on most of the applicants the clothes and shoes were wet or sodden, and if the immigration officers are to be believed, three of them or at any rate two of them eventually made confessions that they only landed that morning, 10th February. Whilst those confessions of course, can only be direct evidence against the three persons concerned, it was indirectly evidence against all the applicants, because it was conceded that they had all arrived together. Further, according to the police, the Indian to whom I referred, admitted that he had been with the other 11 Pakistanis, and that they all landed that morning, 10th February. However, it is only right to say that the evidence in regard to that is pure hearsay, because the Indian concerned has not sworn an affidavit and has not given evidence before this court, and accordingly I disregard anything which it is said that he, the Indian, said. So much for the facts in broad outline.

The real question, as I see it, is as to the proper approach of this court. Do I ask myself the question: have the applicants satisfied me that they had, on 10th February been here for more than 24 hours? If that is the proper question, my answer is: "No". Their evidence is so unsatisfactory that I could not find affirmatively that they had been here for more than 24 hours. In other words I, like the immigration officers, am not satisfied that they had been here more than 24 hours. Or is the proper question: has the respondent, through the immigration officers and the police, satisfied me that the applicants had not been here for more than 24 hours? If so, I for my part could not find beyond doubt, because this would, I think, be the standard of proof, that they had been here for less than 24 hours. True they had told somewhat differing stories, and two are said to have confessed, but with the language difficulties involved and the known natural propensity of men such as these to say whatever they think will suit their case, I could not be sure that they had been here for less than 24 hours. Lies do not prove the converse, and the only positive evidence in this case was as to the state of their clothing. There was, however, no forensic evidence as to the nature of the wet, whether it was sea-water or what it was, and some were said to have been smartly dressed.

Prior to the Habeas Corpus Act 1816, if the gaoler made a return valid on its face, and its validity were challenged, there was nothing that the court could do. If it arose in a criminal matter, the gaoler produced the warrant from the competent court, and that was an end of the matter. If, on the other hand, it arose in a civil matter, again the applicant would be left to bring a civil suit

for false return, so that the matter in issue might be determined by a jury. By the Act of 1816, however, this court was given specific power in a civil matter to enquire into the facts. The Act itself is dealing only with writs of habeas corpus in cases other than a criminal matter or for debt or civil process, and s. 3 provides, in effect, that in all cases provided for by the Act of 1816, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justices or police before whom such writ may be returnable to proceed to examination into the truth of the facts set forth in such return by affidavit or by affirmation. Section 4 provides:

"... the like proceeding may be had in the court for controverting the truth of the return to any such writ of habeas corpus awarded as aforesaid, although such writ shall be awarded by the said court itself, or be returnable therein."

The question then arises what should be the proper approach by the court in determining any such enquiry which it may make. Of course, if the authority on which the gaoler holds the applicant is the authority of a court, the enquiry can only be to see whether the court had facts before them entitling them to issue the authority, the warrant. It could not substitute its own view for that of the court, because habeas corpus is not a remedy by way of appeal. That was made clear by LORD GODDARD, C.J., in *R. v. Board of Control, Ex p. Rutty* (1). In that case a magistrate had found that the applicant was a defective within the meaning of the Mental Deficiency Acts 1913 to 1927, being a feeble-minded person, and that she was subject to be dealt with under those Acts by reason of her being found neglected, and he made a detention order. In due course, leave was granted and the applicant moved for a writ of habeas corpus. LORD GODDARD, C.J., having referred to the position prior to the Habeas Corpus Act 1816, and to the position thereafter, went on to say:

"If on inquiry the court finds there was no evidence by which the order or conviction can be sustained, they can release on habeas corpus or quash on certiorari. This is clear from the cases cited by HILBERY, J. But if there is evidence, whatever this court may think of it and no matter what conclusion the members of the court might have come to if they had been deciding the case which led to the conviction or order, they cannot disturb the finding, for so to do would be to act as a court of appeal in a matter in which no appeal is given."

I mention that case only to emphasise that the present case does not concern in any way the order of a court. We are here dealing with a claim by the executive to detain in custody a British subject, and apart from authority I should myself have thought that in the end the burden in such a case must be on the executive to justify that detention. I say "at the end" because, of course, nothing need be done in the first instance other than to make a good return valid on its face; but if the applicant for the writ challenges that return, as for example claiming that there was no jurisdiction in the executive officer to make the order which resulted in the detention, it would, I think, be for the executive to negative that challenge by proving that jurisdiction in fact existed.

I am supported in this view by what was said by ATKIN, L.J., in *R. v. Secretary of State for Home Affairs, Ex p. O'Brien* (2). The facts do not matter, but ATKIN, L.J., said:

"The case involves questions of grave constitutional importance, upon

(1) 120 J.P. 153; [1956] 1 All E.R. 769; [1956] 2 Q.B. 109.

(2) [1923] 2 K.B. 361; affd. H.L., 87 J.P. 174; [1923] A.C. 603; [1923] All E.R. Rep. 442.

which I feel bound to express my own opinion, even though I repeat to some extent the views already expressed by the other members of the Court. That a British subject resident in England should be exposed to summary arrest, transport to Ireland and imprisonment there without any conviction or order of a Court of Justice, is an occurrence which has to be justified by the Minister responsible."

Further support is also, I think, to be obtained from the Privy Council case of *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1). Again it was LORD ATKIN who gave the advice of the Board. What was challenged in that case was an order made by the governor of Nigeria providing that the appellant, who was the applicant for the writ, should leave a specified area, and on his failing to comply, ordered his deportation to another place in the colony. The governor could only make that order validly if the applicant was a native chief; if he had been deposed; and there was a native law or custom which required him to leave the area. These were, the conditions precedent to a valid order for deportation being made by the governor. The Crown, the respondent, argued in that case that the matter could not be reviewed at all by the courts or by the Privy Council, and it is on that point that LORD ATKIN was giving the advice of the Board. He began by setting out what was the contention of the applicant. He said:

"The applicant contests the validity of both orders, though the main attack is necessarily directed to the first. He says: (i) He was not a native chief, and did not hold an office. (ii) He was not deposed or removed from this office, and the Governor's sanction was therefore irrelevant. (iii) There was no native law or custom, which required him, or any chief or native whether deposed in the manner alleged against him or in any other way, to leave the area in question."

LORD ATKIN subsequently said:

"Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

Having decided that it was a matter into which the courts could enquire, the Judicial Committee ordered that the rule nisi should take the form ordering the respondent—

"to show cause why a writ of habeas corpus should not issue directed to them to have the body of Eshugbayi, Eleko, immediately before this Court at Lagos to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in this behalf. Upon the grounds [The grounds were then set out in the form of the contentions raised by the applicant] that:—1. The said Eshugbayi, Eleko, was not on August 6, 1925, or thereafter a native chief and did not hold any office. 2. That the said Eshugbayi, Eleko, had not on August 6, 1925, or thereafter been deposed or removed from any office . . ."

(1) [1931] A.C. 662; [1931] All E.R. Rep. 44.

I confess that it seems to me clear from that, that LORD ATKIN was stating, first, the cardinal principle of English law that no member of the executive can interfere with the liberty of a British subject except on the condition that he can support the legality of his action before a court of justice; and secondly that the clear inference here is that LORD ATKIN felt that at the end of the day it was for the members of the executive to satisfy the court as to the validity of the order.

I should mention in regard to that case that in a later case to which I must refer in more detail hereafter, SCOTT, L.J., read LORD ATKIN's advice in that sense. The case is *R. v. Home Secretary, Ex p. Greene* (1), and SCOTT, L.J., in referring to the case of *Eleko* (2), said:

"It was held that the ordinance in question made each fact a condition precedent to any exercise by the governor of the power to deport, and that each condition had to be established either by admission or proof before a court. On none of the three was the governor given by the ordinance any power of discretionary decision, nor did any question of confidential information arise."

Accordingly I should have thought that here, as in the Nigerian case, once the applicants allege that a state of affairs on which the jurisdiction of the immigration officers depended did not exist, it was for the respondent to show that it did. This was, of course, unnecessary in the first instance because, as I see it, the respondent made a return valid on its face. This he did, not through swearing an affidavit himself, but through the affidavits of the immigration officers, who said that in each case a notice of refusal was served, that the applicant was handed over to a constable to take him to Brixton, coupled with a reference to s. 13 of the Act of 1962. Once, however, the applicants alleged that a condition precedent to the validity of the notice of refusal was not performed, i.e., examination before 24 hours had elapsed, it would be for the respondent to negative that challenge and prove that the condition precedent, namely examination within 24 hours, had been performed.

It is said, however, that there is direct authority to the contrary, and authority binding on this court. Reference is made to the case of *Greene* (1), which I have just mentioned, both in the Court of Appeal and in the House of Lords. SCOTT, MACKINNON and GODDARD, L.JJ., expressed the view that it was always for the applicant to prove the facts on which he challenged the validity of the return. I do not propose to read more than three passages from GODDARD, L.J.'s judgment in that case. He said:

"In my opinion, once it is shown that he is detained under a warrant or order which the executive has power to make, it is for the applicant for the writ to show that the necessary conditions for the making of the warrant . . . do not exist."

Later, having referred to a passage in the speech of LORD WRENBURY in *R. v. Halliday, Ex p. Zadig* (3) GODDARD, L.J., said:

"That in terms puts the onus on the applicant, and I think the conclusion is that the applicant can controvert the return, and, if he proves his case—and it is for him to prove it—he will be discharged."

Finally GODDARD, L.J., said:

(1) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

(2) [1931] A.C. 662; [1931] All E.R. Rep. 44.

(3) 81 J.P. 237; [1917] A.C. 260.

"I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done."

MACKINNON, L.J., who gave a short judgment, stated that he had had the opportunity of reading the judgment which GODDARD, L.J., was about to deliver, and said:

"Finding that he had expressed more clearly what I had been writing, I thought it was undesirable for me to complete my disquisition, and that it would suffice for me to say that I agreed with all that he had said."

MACKINNON, L.J., did, however, feel that he ought to add a few words, and he there said: "The onus of showing that the order is invalid rests upon the applicant."

That case went to the House of Lords, and there is no doubt that VISCOUNT MAUGHAM, L.C., specifically approved the last passage which I read from the judgment of GODDARD, L.J. LORD MAUGHAM said: "I agree with what GODDARD, L.J., in his careful judgment said on this point", and he proceeded to quote the passage that I have read. LORD WRIGHT, in speaking of a return, said: "It is good on its face unless and until it is falsified."

I appreciate, of course, that those are passages from very eminent judges which, on their face, negative the view which I have formed; but I think it is necessary to consider the context in which those passages occur. The case concerned an application for a writ of habeas corpus in which the return exhibited an order made under reg. 18B of the Defence (General) Regulations 1939 of the Secretary of State saying that he had reasonable cause to believe that the applicant was of hostile origin or association, and ordering his detention. It was, of course, held that the belief could not be enquired into at all. The Secretary of State's order was a valid return, and all in fact that the applicant said by way of answer was "I do not know why I was detained". That clearly was not a sufficient challenge to the order to call for anything more from the Secretary of State. It was not a case in which any challenge was made in regard to conditions precedent on which jurisdiction depended. The Secretary of State was not bound to give the grounds of his belief, any more than the immigration officers in the present case could be obliged to say why they exercised their discretion under s. 2 of the Act of 1962 in the way they did. Indeed, in *Greene's* case (1) the only possible challenge could have been an allegation of bad faith on the part of the Secretary of State, and this was disclaimed.

All that I think was intended in that case was to say that the order stood as an order valid on its face, that is the Secretary of State's order, and it was for the applicant to make a proper challenge to its validity if he could. The court was not dealing with the question that arises here as to the position at the end of the day when the applicant has challenged the validity of the authority to detain based on a lack of jurisdiction in the executive who made it. Indeed, I think this is clear from what MACKINNON, L.J., himself said in the short judgment, because having said in the passage I have previously read that the onus of proof that the order is invalid rests on the applicant, he then went on:

"No evidence on the part of the gaoler or of the Home Secretary to establish the validity of the order (except proof of its signature, if that is disputed) is necessary, unless the applicant has adduced evidence of its invalidity sufficient to discharge and shift the onus of proof which rests primarily upon him."

(1) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

That as it seems to me is the passage coming nearest to this case in which **MACKINNON, L.J.**, is contemplating the possibility that after a challenge to the validity of the order, it will be for the executive, at the end of the day to negative that challenge.

I would only say this finally. This is a thoroughly unmeritorious application. If ever men should be sent back to the country from which they came, it is the applicants. But to enable this to be done would, in my judgment, mean making bad law. The fact is that nobody contemplated this situation arising when the Commonwealth Immigrants Act 1962, was passed, and it is only right to say that under the recent Act, the Commonwealth Immigrants Act 1968, the loophole here disclosed has at any rate been partially closed, in that the 24 hours allowed for examination has been extended to 28 days.

In the result, however, I have come to the conclusion that this application succeeds, and that the applicants should be discharged.

ASHWORTH, J.: This case raises an important question of principle relating to applications for writs of habeas corpus and in addition a question of fact, no less important to the applicants, who are 11 Pakistanis at present detained in Her Majesty's prison at Brixton. It is with regret that I say that my conclusion on the question of principle differs from that reached by **LORD PARKER, C.J.**, and that on one approach to the question of fact my conclusion also differs from his.

The question of principle may be stated thus: when a return is made by a custodian of a subject and the subject seeks to controvert the fact or facts relied on by the custodian as justifying his detention of the subject, where does the onus of proof lie? Is it incumbent on the custodian to prove the truth of the facts on which he relies? Or is it for the applicant subject to prove their falsity? Another way of posing the questions, which is perhaps more appropriate to the present case, is to ask: if a custodian is given statutory authority to detain the subject on certain conditions of fact being satisfied, is it incumbent on him to prove that the conditions have been fulfilled or is it for the applicant to prove that they have not?

The authority to detain the present applicants is derived from the Commonwealth Immigrants Act 1962 which provides by s. 2 (1) (a) that an immigration officer may on the examination of any Commonwealth citizen to whom s. 1 of the Act applies who enters the United Kingdom refuse him admission. There can in my judgment be no doubt that each of the 11 Pakistani applicants was refused admission by an immigration officer. But s. 3 (1) of the Act contains supplementary provisions and enacts that the provisions of Pt. 1 of Sch. 1 to the Act are to have effect with respect to (para. (a)) the examination of persons landing in the United Kingdom from ships and (para. (d)) the detention of any such persons pending removal from the United Kingdom. Section 13 contains provisions regarding detention of which the most relevant is in sub-s. (4): any person who is detained by virtue of this Act shall be deemed to be in legal custody.

Part 1 of Sch. 1 is clearly of great importance and para. 1 (2) is in these terms:

"A person shall not be required to submit to examination under this paragraph after the expiration of the period of twenty-four hours from the time when he lands in the United Kingdom . . ."

It may be noted in passing that this sub-paragraph does not in terms provide that no examination may be made after the period of 24 hours; it provides that a person shall not be required to submit to an examination after that period. For my part I do not think that the respondent can derive any great support

from this language, as it is clear that each of the applicants was in fact required to submit to an examination, and the crucial question is whether by the time of that requirement he had been in the United Kingdom for more than 24 hours.

Paragraph 2 deals with notice and it may be noted that, in contrast to the language used in para. 1 (2), para. 2 (3) provides in terms that a notice shall not be given to any person unless he has been examined and shall not be given to any person later than 12 hours after the conclusion of his examination. Nothing turns on this sub-paragraph in this case since, if the examinations were made within the statutory period of 24 hours, it is clear that the requisite notices were given within 12 hours of their conclusion.

Paragraph 4 contains provisions regarding detention pending removal, but it is unnecessary to refer to them in detail.

The respondent contends that the return is on the face of it good: each of the applicants has been examined, each of them has been refused admission, each of them has been given the requisite notice and it follows that detention pending removal is lawful. It is however rightly conceded that if the examinations were not made within the statutory period of 24 hours, there was no power in the immigration officer to refuse admission and the detention cannot be justified. Counsel for the respondent contended that, quite apart from any decided cases in which courts have considered the right of a detained subject to controvert the facts relied on as justifying the detention, the structure and language of the Act of 1962 are such as to lead to the conclusion that a person who asserts that its provisions have not been complied with has the burden of proving the facts on which the assertion is based. For my part I take the view that the Act itself provides no clue as to the burden of proof, either in favour of the applicants or the respondent. Still less do I accept a contention put forward by counsel for the applicants that, because the very recent Commonwealth Immigrants Act 1968 in regard to a particular matter places a burden of proof on a would-be immigrant, one ought to conclude that there could be no burden of proof on him in regard to other matters dealt with by the Act of 1962.

In considering the matter as a question of principle, it is I think helpful to mark how a court comes to be involved. The process starts with a person being detained, and the courts, in their jealous concern for the liberty of the subject, have always so to speak held the door open for such a person to question the legality of his detention. Accordingly the custodian is required to make a return, in other words, to justify the detention: he may do so in various ways which it is unnecessary to refer to in detail. It is, in my view, to this stage of the proceedings that the observations of ATKIN, L.J., in *R. v. Secretary of State for Home Affairs, Ex p. O'Brien* (1) and of LORD ATKIN in *Eshugbayi Eleko v. Officer administering the Government of Nigeria* (2) to which LORD PARKER, C.J., has referred, were directed. I accept entirely the principle that the custodian is called on to justify the detention, but he does so by making a return which is valid on the face of it. If such return discloses on its face that the detention is unjustified, there is no more to be said: see *Bushell's Case* (3). But the return may be valid on its face and it is then for the person detained to place evidence before the court showing that what appears to be a valid return is in fact invalid. He is at this stage raising an issue: he is doing more than traversing the return, because a mere traverse will not displace what is on its face a valid return. He is asserting facts which render the return invalid and in my judgment

(1) [1923] 2 K.B. 361; *affd.* H.L., 87 J.P. 174; [1923] A.C. 603; [1923] All E.R. Rep. 442.

(2) [1931] A.C. 662; [1931] All E.R. Rep. 44.

(3) (1670), Vaugh. 135, 124 E.R. 1006.

his position is to be compared with that of a plaintiff alleging false imprisonment: on this point see *Liversidge v. Anderson* (1) and in particular the speech of VISCOUNT MAUGHAM, in which case it was held that the onus of proof was on the plaintiff. In my judgment, as a matter of principle, it is for an applicant in habeas corpus proceedings, who alleges that there are facts which vitiate a return *prima facie* valid, to prove them.

Needless to say, I am greatly relieved to find that this conclusion is in harmony with the decision of no less than three Courts before which *Greene v. Secretary of State for Home Affairs* (2) was argued in 1942. I do not intend to lengthen this judgment by citing passages from the judgment of GODDARD, L.J., in which the principle which I believe to be right was expressed in the clearest possible terms. Counsel for the applicants was constrained to submit that GODDARD, L.J., was in error; if that is right, I am in good company.

It is true that in the other judgments and speeches there are to be found phrases which can be and were prayed in aid by the present applicants, but for my part I do not think that any of the authors of those phrases intended to qualify or dissent from the judgment of GODDARD, L.J. The decision in *Greene's* case (2) has stood for 25 years, and, so far as counsel were aware, it has never been doubted or explained or distinguished in any reported case. Following at a respectful distance behind those great leaders, I am content to apply the principles they laid down.

Counsel for the respondent supported his argument by referring to what he said was a principle of evidence, that where the relevant information is within the knowledge of one party only the burden of establishing the relevant facts is on him. I cannot accept that contention, but there is no doubt in this case that the placing of the burden of proof on the applicants reflects no hardship on them. They best of all know when they entered the United Kingdom and their difficulty lies not in the providing of evidence, but in the telling of the truth.

Accordingly, I would hold that in the present case it is for the applicants to prove the facts necessary to vitiate the return, namely, that they had been in the United Kingdom more than 24 hours before they were examined. If in law the onus of proof is indeed on the applicants, their efforts to discharge it are in my view entirely unconvincing. Counsel for the applicants accepted the comment that their evidence was riddled with discrepancies and indeed he had no option but to do so. When the whole of the evidence is considered, the comment may well be considered charitable.

If on the other hand the onus of proving the challenged facts is on the respondent, I should be prepared to hold that he had discharged it. If I may say so, I was greatly impressed by the cogent submissions made by counsel for the respondent on this part of the case. There is no need for me to repeat them in this judgment but I single out one feature as particularly convincing. On what was described as a bright and sunny morning this group of 11 Pakistanis was discovered, most of them (if not all) with wet clothing consistent with their having recently waded ashore, but wholly inconsistent, in my view, with their having been living in a house in this country for three or four days. Assuming in favour of the applicants that the standard of proof is the same as in a criminal case, I have asked myself whether I can be sure that they had been in this country for less than 24 hours, and my answer is, yes. In giving this answer I have disregarded entirely the statements attributed to one Kumar, an Indian, which were placed before the court *de bene esse*, but which in my judgment are inadmissible.

(1) [1941] 3 All E.R. 338; [1942] A.C. 206.

(2) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

For these reasons, if the matter rested with me, I should be in favour of dismissing these motions.

BLAIN, J.: In this matter counsel for the applicants moves on behalf of one Mohammad Ahson and ten other men, all of whom are Pakistani nationals and Commonwealth citizens, for an order that writs of habeas corpus be issued directing the governor of Brixton Prison to have their bodies brought before the court. At present each of the applicants is detained in Her Majesty's prison at Brixton as being an immigrant refused admission to the United Kingdom under the provisions of the Commonwealth Immigrants Act 1962.

It is unnecessary to recite again the facts already detailed by LORD PARKER, C.J. For the purposes of this judgment, suffice it to say three things: first, that admittedly all 11 applicants arrived in this country by clandestine means in February 1968; that does not constitute any offence. All were and are British citizens. Secondly, that all 11 claim and depose that they had been in this country for some days before the immigration authorities found opportunity to examine them; and thirdly, that the immigration authorities took the view that none of the applicants had in truth been in this country for as much as 24 hours before examination, or alternatively they, the immigration authorities, were not satisfied, and they say this court on the evidence cannot be satisfied, that the applicants had been in the United Kingdom for 24 hours before examination.

In this connection there is circumstantial evidence, and in either two or three cases, some evidence of admissions to support the view of the immigration authorities, and certainly the applicants' evidence to the contrary is full of inconsistencies, though these may be explained in part, at least, by language and other difficulties and instincts. The relevance of the issue of fact thus thrown up is this.

By virtue of the provisions of s. 1 (3) of the British Nationality Act 1948, each of these applicants is a British subject, and *prima facie* has the same rights to be in this country as has any native Englishman. At the relevant time the only curtailment of the right was to be found in the Commonwealth Immigrants Act 1962, an Act passed in order to make temporary provision for controlling the immigration into the United Kingdom of Commonwealth citizens who came within the provisions of s. 1 of the Act. It is not disputed that the applicants fall within the terms of that section, and so the relevant provisions of the Act apply to them. In passing, the Commonwealth Immigrants Act 1968, which passed into law last month, amends certain provisions of the Act of 1962, but the Act of 1962 still remains the principal Act.

Section 16 of the Act of 1962 empowers the Secretary of State to appoint immigration officers, and s. 2 (1) (a) enacts that, subject to certain irrelevant provisions, an immigration officer:

"... may, on the examination under this Part of this Act of any Commonwealth citizen to whom section one of this Act applies who enters or seeks to enter the United Kingdom,—(a) refuse him admission into the United Kingdom..."

There is no other power of refusal, at least none relevant to these proceedings, and this power is exercisable only after examination of the Commonwealth citizen concerned.

By virtue of s. 3 (1), the provisions of Sch. 9 to the Act have effect with respect to four matters: first, the examination of those landing or seeking to land in this country; secondly, the exercise by immigration officers of the power of

refusal of admission; thirdly, the removal from the United Kingdom of Commonwealth citizens refused admission under s. 2 of the Act; and fourthly, the detention of such persons or citizens pending further examination or pending removal.

Section 13 (1) provides that a person whose detention is authorised under this Act may be so detained in such place as the Secretary of State may direct, and s. 13 (4) authorises his arrest without warrant by a constable or immigration officer, and provides that a person so detained shall be deemed to be in legal custody.

I now turn to the relevant provisions of Sch. 1. By virtue of para. 1 (1), subject to certain provisions:

"... an immigration officer may examine any person who lands or seeks to land in the United Kingdom for the purpose of ascertaining whether that person is or is not a Commonwealth citizen subject to control under Part I of this Act, and if so for the purpose of determining what action, if any, should be taken in his case under the said Part I; and it shall be the duty of every such person to furnish to an immigration officer such information in his possession as that officer may reasonably require for the purpose of his functions under this paragraph."

But para. 1 (2) provides that a person is not required to submit to such examination more than 24 hours after he has landed in the United Kingdom. Of course in most cases where an immigrant arrives openly by ship or aeroplane at a recognised seaport or airport, there will be no dispute of fact about his time of arrival. But in the case of clandestine landing in a remote place at dead of night, only the immigrant himself and those who participate in or happen to witness the arrival will know precisely when it occurred. Once, in fact, he has been in the country for 24 hours, no immigration officer can compel him under the Act of 1962 to submit to examination.

In passing, although it is not relevant to the determination of the present applications, it is to be observed by s. 4 of the Act of 1968 the period is now 28 days instead of the old 24 hours.

Paragraph 2 (1) of Sch. 1 provides that the immigration officer's power to refuse admission is to be exercised by notice in writing to be given to the person to whom it relates, and by virtue of para. 2 (3), so far as relevant, such a notice can only be given to a person who has been examined in pursuance of para. 1, that is to say within 24 hours of landing, and only be given within 12 hours of such examination. Paragraph 3 provides for removal of immigrants on refusal of admission; only sub-para. (2) and (3) are relevant. Under sub-para. (2) the Secretary of State may direct removal by ship or aircraft, and by virtue of sub-para. (3) no such direction may be made after the expiration of two months from the date of refusal of admission. Finally, para. 4 (1) provides for detention pending removal. An immigrant who is refused admission under s. 2 of the Act may be detained under the authority of an immigration officer or a constable pending the giving of directions under para. 3, and pending removal in pursuance of such directions. Those, I think, are the relevant provisions of Sch. 1.

It is admitted here that notices of refusal were given to each applicant by an immigration officer, and that it is under the authority or purported authority of such notices that these applicants are detained. Counsel for the applicants' contention is that the notices were invalid and of no effect because, he said, the examinations which necessarily preceded them did not take place within 24 hours of the landing of the immigrants, and he asks the court to determine as a fact that the landings were earlier than that. This latter request I find

myself quite unable to accede to on the evidence, but in any event counsel for the applicants submitted that there is an onus on the Crown to prove that the examination takes place within 24 hours of the landing, and he says there is an onus akin to that on the prosecution in a criminal case to prove beyond reasonable doubt so that the court or the jury can be sure.

Counsel for the respondent says, no: under para. 1 (1) of Sch. 1, he submits that the immigration officer has a right to examine, and therefore the immigrant has a duty to submit to examination, and he goes on to say that under para. 1 (2) the immigrant can claim exemption from the duty to submit if he has been in the United Kingdom for over 24 hours. But, so runs the argument, that must be construed to mean that his claim to such exemption is dependent on proof by him that he has been in the United Kingdom for 24 hours or more. As a matter of expediency that might seem an attractive argument, attractive because one can see that in circumstances where there could be doubt, only the immigrant himself and his associates could have really known when he landed, so it might be logical to put on him the burden of proving the fact which he alone knows.

In cases of clandestine landings, a burden of proof on the immigration authorities or the Crown could be an embarrassment in the efficient exercise of their functions; moreover, it could be said that those who choose to enter the country in such ways rather than openly can hardly feel aggrieved if the burden is cast on them to prove they have not obtained liability to those statutory controls to which they would be subject had they arrived in more conventional circumstances. Unless statutory or other authority compels acceptance of such an approach, I would reject it. It seems to me basically to ignore certain fundamental principles. In the first place there is no law to prevent a British subject arriving by private yacht or some less glamorous vessel at any time of the day or night on any part of the coast, and no offence is committed if he sails across from Le Touquet or swims from Cap Gris Nez.

Secondly, the provisions of the Commonwealth Immigrants Act 1962 which impose various controls and restrictions on the otherwise unlimited rights of a British subject to enter the United Kingdom, constitute a statutory fetter on the freedom of the subject, a fetter necessary for reasons which concern Parliament but which do not concern this court. The consequences may go to the very liberty of the subject, as they have done in this case.

In my view, Parliament must not be supposed to have put on the subject the burden of proving freedom from liability to detention in prison of a citizen who has done nothing unlawful, unless that burden is expressed in the clearest and most unequivocal terms.

That will be so if we are dealing with a statutory defence to a criminal charge; it should be so where no question of a criminal offence arises. In fact this Act does create penal offences; under the provisions of s. 4, to the language of which it is not necessary to refer, an offence is committed by a Commonwealth citizen to whom s. 1 applies if he enters or remains in the United Kingdom in defiance of an immigration officer's refusal of admission. If charged with such an offence, must he, in order to defend himself, prove that the refusal was invalid? I would hope not. I would expect the Crown to have to prove his guilt, and if Parliament intended otherwise it should so say in clear terms, as indeed it has later said in the case of a new statutory offence introduced by the Act of 1968. That does not, of course, affect the present case. It exemplifies the way in which it should be done, in my view, if it is to lead to that conclusion.

I say at once that if the burden of proof is on the respondent, it is not discharged to my satisfaction so that, as a notional jurymen, I could feel sure that at the

time of examination these applicants had not spent more than 24 hours ashore. Affidavit evidence that clothing was damp or wet, shoes in particular wet and in some cases sandy, may go a long way to establish that they have not arrived by conventional means, and that is not in dispute, but it does not satisfy me that they had been here for less than 24 hours. Evidence that immigration officers were not satisfied that the immigrants had been here for 24 hours does not of itself satisfy me that they had in fact been here for a shorter time, and in particular the evidence of what the Indian, Ravi Kumar said, either as a go-between or as interpreter or otherwise I find no more convincing than that of the immigration officers, particularly as there is no affidavit from that person before the court, and for that matter it is by no means clear how much of what he said would be understood by the applicants in the examples in which they were present to hear it.

So, in my judgment, the decision must turn on the question of onus of proof. Here it is submitted by counsel for the respondent that on a true interpretation of the Act, the onus is on the applicants, a submission which he claims is supported by authority, and in particular by the decision in *R. v. Home Secretary Ex p. Greene* (1), to which my Lords have referred and to which I will return shortly. From the time of *Magna Carta* a citizen detained without lawful authority has had access to the courts to secure his release. But it is unnecessary today to consider the procedure prior to the passing of the Habeas Corpus Act 1816, or to consider the procedure in the somewhat different considerations which arise in cases of detention for some criminal matter. By s. 1 of the Act of 1816 on civil process on complaint made by a detained person supported by affidavit showing probable and reasonable ground for the complaint, the courts are empowered by writ of habeas corpus ad subjiciendum to call on the person detaining the complainant to produce the body before the court. By s. 3 the return to the writ is good and sufficient in law in itself, but the court may enquire into the truth of the facts set out in it, and by s. 4 the court may enquire into the facts even though the writ is awarded by the court itself. This is the statutory authority challenging the validity of detention of the subject. On an application for a writ of habeas corpus the gaoler or other person detaining the applicant is called on to justify the detention. This he does by producing a legal order, an order legal on the face of it directing or authorising the detention.

In the case with which the court is concerned today, the return comprises the notice of refusal of admission combined with the statutory right to detain a person to whom such a notice has been given. The applicants do not dispute the giving of the notices, but they say they were of no effect because when given there was no power to give them, they followed within 12 hours of examination but that examination, it is said, was not conducted within 24 hours of the arrival in the United Kingdom, and so was itself of no effect for the purposes with which we are concerned.

That is a controversial fact, and in my view it is of great importance to bear in mind that there is in this case a complete controversy of relevant fact, whereas in certain cases cited there was none.

Bearing that in mind, I turn to what has been called the Nigerian case, *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (2), a Privy Council case where the headnote reads:

"The governor of Nigeria, purporting to act under the Deposed Chiefs Removal Ordinance, ordered the appellant to leave a specified area, and upon

(1) [1941] 3 All E.R. 388; [1942] A.C. 284; affd. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

(2) [1931] A.C. 662; [1931] All E.R. Rep. 44.

his failing to comply ordered his deportation to another place in the colony. The appellant applied to the Supreme Court of Nigeria for a writ of habeas corpus, contending (i) that he was not a native chief, (ii) that he had not been deposed, (iii) that there was no native law or custom which required him to leave the area, and that consequently the conditions did not exist entitling the governor to make the orders. *Held*, that the powers of the governor under the Ordinance were purely executive, and that it was the duty of the court to investigate the questions raised by the appellant's contentions and to come to a judicial decision thereon . . ."

I need not read the rest of the headnote.

The Deposed Chiefs Removal Ordinance is quoted in LORD ATKIN's judgment so far as relevant, omitting irrelevant words, it reads thus:

" 2. (1). When a native chief . . . [point 1] has been deposed . . . [point 2] by or with the sanction of the governor . . . (a) If native law and custom shall require [point 3] that such deposed chief shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office; or (b) If the governor shall be satisfied that it is necessary for the re-establishment or maintenance of peace, order and good government in such area that the deposed chief or native shall leave such area . . . "

What happened in that case was that the governor in purported exercise of that power ordered the appellant to leave the specified area, and on his failure to comply ordered his deportation. There was power in the ordinance so to do. The appellant applied to the Supreme Court of Nigeria for a writ of habeas corpus; the Supreme Court refused the application and the appellant appealed to the Privy Council, where LORD ATKIN delivered the judgment of the Board.

After referring to the Nigerian government order impugned, LORD ATKIN stated the appellant's contentions thus:

" The applicant contests the validity of both orders, though the main attack is necessarily directed to the first. He says: (i) He was not a native chief, and did not hold an office. (ii) He was not deposed or removed from this office, and the governor's sanction was therefore irrelevant. (iii) There was no native law and custom which required him, or any chief or native, whether deposed in the manner alleged against him or in any other way, to leave the area in question. He says that these are three conditions precedent to any authority to make an order of withdrawal, and their existence can and must be investigated by the court whenever the validity of the order or a deportation order founded on it is the subject of contest in judicial proceedings."

After reciting the decision of the Nigerian Supreme Court appealed against, LORD ATKIN stated:

" Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The governor acting under the ordinance acts solely under executive powers, and in no sense as a court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."

I need not read further, but one reads:

"The Court expressly held they had power to consider this question and resolved it against the applicant. The question whether the applicant was an alien or not did not arise. He admittedly was; but their Lordships agree with the opinion of Lord J. [in *R. v. Governor of Brixton Prison, Ex p. Sarno* (1).]"

The order made is not without interest, and I think relevance. It reads thus:

"It is ordered that this day, the 15th day of January, 1929, be given to the officer administering the government of Nigeria and the district officer of Oyo to show cause why a writ of habeas corpus should not issue directed to them to have the body of Eshugbayi, Eleko, immediately before this court at Lagos to undergo and receive all and singular such matters and things as the court shall then and there consider of concerning him in this behalf. Upon the ground that:—1. The said Eshugbayi, Eleko, was not on August 6, 1925, or thereafter a native chief and did not hold any office. 2. That the said Eshugbayi, Eleko, had not on August 6, 1925, or thereafter been deposed or removed from any office. 3. That native law and custom did not require that the said Eshugbayi, Eleko, should leave any area over which he exercised influence by virtue of any office or at all. 4. That by reason of the premises the order under hand of the officer administering the government, dated the 6th day of August, 1925, and the order under the hand of the said officer and seal of the colony and protectorate of Nigeria dated the 8th day of August, 1925, concerning the said Eshugbayi, Eleko, are invalid . . ."

LORD ATKIN said:

"On the argument of the rule counsel for the respondents to the motion [that is the government of Nigeria] should show cause, and counsel for the applicant should then, if required, reply in support of the rule."

In *Greene's* case (2) the effect of LORD ATKIN's judgment was differently interpreted by SCOTT and by GODDARD, L.J.J. SCOTT, L.J., referred in these terms to that case:

"In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (3), the relevant ordinance conferred on the governor jurisdiction to deport if, and only if, certain antecedent propositions were established or admitted as extrinsic facts. First, the person to be deported must have been a native chief. Secondly, he must have been deposed, and even then he could not be deported unless, thirdly, there was a native custom requiring him to leave the area where he had been chief. It was held that the ordinance in question made each fact a condition precedent to any exercise by the governor of the power to deport, and that each condition had to be established either by admission or proof before a court. On none of the three was the governor given by the ordinance any power of discretionary decision, nor did any question of confidential information arise."

GODDARD, L.J., having referred to orders which were before the court, said:

"... the Secretary of State . . . acts wholly in an executive, and not in a judicial capacity. Counsel for the appellant accordingly relies on the

(1) 80 J.P. 389; [1916] 2 K.B. 742.

(2) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

(3) [1931] A.C. 662; [1931] All E.R. Rep. 44.

advice of the Judicial Committee, delivered by LORD ATKIN in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1). In my opinion, however, that passage does not mean that, where the executive has detained a person under statutory authority (and the regulations have the force of statute), he can, merely by saying 'I don't know why I have been detained', oblige the executive to prove that every condition necessary to the making of the order has been fulfilled. In my opinion, once it is shown that he is detained under a warrant or order which the executive has power to make, it is for the applicant for the writ to show that the necessary conditions for the making of the warrant or order do not exist."

With the greatest diffidence I confess that for my part I prefer SCOTT, L.J.'s interpretation of LORD ATKIN's words. The argument in the Nigerian case does not seem to me to be based on the proposition that the applicant need only say: I do not know why I have been detained. It seems to me, and I think it seemed to SCOTT, L.J., that the argument depended on a positive challenge to each of three positive conditions precedent.

That brings one to a consideration, which need not be a lengthy consideration, of *Greene's case* (2) itself, or rather to a consideration of its relevance, because I do not myself feel any doubt, nor do I gather does anyone in this court, as to its validity. In the Nigerian case (1) there had been facts in dispute the existence of which were conditions precedent to the making of the order which had to be shown: Was the applicant a native chief, had he been deposed, was there a native law and custom that required his removal from the former area of his jurisdiction? As I understand *Greene's case* (2), there is not a single disputed fact. There is no dispute about the state of the Home Secretary's mind about his genuine belief, and I interpolate here the foundation, as I see it, for any thought that there was such a dispute is to be found in a recital in the course of VISCOUNT MAUGHAM's opinion in the House of Lords that the applicant in his affidavit had challenged and said that he did not believe that Sir John Anderson, the Home Secretary, did in fact believe him, the applicant, to be a person of hostile association. That may have been challenged in the affidavit, but the state of the Home Secretary's mind was not challenged, his bona fides were accepted in argument throughout.

That appears to me to make a very great difference. The Court of Appeal report is the important one in *Greene's case* (2) for present purposes, because the decision of the Court of Appeal was affirmed in the House of Lords, and words of GODDARD, L.J., much relied on by the Crown in this case were specifically approved by LORD MAUGHAM. As is well known, *Greene's case* (2) was one which came under reg. 18B of the Defence (General) Regulations 1939 made under the provisions of the Emergency Powers Act 1939 for the purposes of dealing with the war-time emergencies. The first two paragraphs of the headnote in *Greene's case* read thus:

"By the Defence (General) Regulations, 1939, reg. 18B, para. (1): 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations, or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained'. By para. (8): 'Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall

(1) [1931] A.C. 662; [1931] All E.R. Rep. 44.

(2) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

be detained in such place as may be authorised by the Secretary of State and in accordance with instructions issued by him.'

"The Home Secretary, whose functions under para. (1) of the regulation are executive and not quasi-judicial, is vested by para. (1) with discretionary power, and the court will not inquire into the grounds on which he has formed his belief, nor require him to produce the information on which he has done so. If the information is of a confidential character, he has a right to refuse to produce it in the public interest."

I will not read more of the headnote.

SCOTT, L.J., after tracing what I may call the pedigree of the particular defence regulation, referring in particular to its ancestor in the Defence of the Realm (Consolidation) Act 1914 in the previous European war, said:

"Although it is not now pressed strongly upon us, so much which has been urged verges on that argument that I think it useful to quote LORD WRENSBURY's words [in *R. v. Halliday, Ex p. Zadig* (1)]: 'The application before your Lordships is for a writ of habeas corpus, and the ground advanced is that reg. 14B is ultra vires. If that were established he (the applicant) would be discharged. The Habeas Corpus Act is in full force; but this statute and the regulations made under it have provided machinery for achieving in a way other than that of suspending the Habeas Corpus Act the preventive detention of persons who are not alleged to have committed any offence, but for whom it is desired to prevent from committing one. The regulation is, in my judgment, one within the authority given by the Act'. With that preface for the purpose of clearing the air round the problem of interpretation, I come to the crucial point. What is the meaning fairly attributable to the opening language of cl. (1)? Who is to decide the issue of reasonable cause, the Secretary of State or a court? If a court . . . how could the question itself be brought before the court? By certiorari to quash his order [i.e., the Secretary of State] or mandamus to hear and determine according to law? Obviously neither. It cannot be by habeas corpus, because the High Court does not sit as a court of appeal in such proceedings."

There in my view SCOTT, L.J., is emphasising the difference to which LORD PARKER, C.J., referred earlier, between a review of an executive act and a would-be appeal against a judicial decision. In that case it was held—there is no need to look at the passages—that the question of whether the Home Secretary in fact had reasonable cause for his belief was not a question of fact for the court to enquire into. His state of mind, the belief that he had, as I have indicated, although impugned on affidavit, was not in dispute on the hearing and was accepted. I have already referred to the reference to the Nigerian case (2), but there is one further passage in *Greene's* case (3) which I feel I should not overlook; it would be quite wrong so to do. That is the passage, strenuously relied on by the respondent, in GODDARD, L.J.'s judgment, to which reference was made in the House of Lords and which reads:

"I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an

(1) 81 J.P. 237; [1917] A.C. 260.

(2) [1931] A.C. 662; [1931] All E.R. Rep. 44.

(3) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.

affidavit. It must depend on the ground on which the return is challenged, but, where all that the prisoner says in effect is, 'I do not know why I am interned, and I deny that I have done anything wrong', that does not require an answer, because it in no way shows that the Secretary of State had not reasonable cause to believe, or did not believe, otherwise."

That is a passage to which LORD MAUGHAM referred.

Of course, I can only pay a proper respectful obeisance to that statement including that conclusion, but I do not find it relevant. As LORD MAUGHAM said, these conclusions were intended to apply to an order made by an officer responsible for the making of such an order; there were no factual conditions precedent to the making of such an order; it was an order that recited only the undisputed state of mind of the Home Secretary.

In this case the notice of refusal of admission given by the immigration officer or officers to the applicants in the circumstances is not comparable to the order of the Secretary of State in *Greene's* case (1). It is far more like the order in the Nigerian case (2). The validity depends on two conditions precedent, the one, fulfilled, that he has been given a notice within 12 hours of the examination; the other, challenged, that the examination took place no more than 24 hours after the immigrant's landing. There has emerged here a dispute of fact into which the court must enquire and the notice of refusal of admission does not assert the ground's requirement of fact, that is to say does not assert that examination was within 24 hours of landing; indeed it is not in dispute that the notice was given within 12 hours of examination. In *Greene's* case (1) the sole issue of fact was as to the state of mind of the Home Secretary and the notice did assert that.

In my judgment, therefore, *Greene's* case (1) is not apt to govern the decision here. Insofar as the general statement in that case which I quoted might be taken to refer to cases where there are conditions precedent to the exercise of the power of detention, which itself depends on disputed questions of fact, I think with respect that those remarks would be obiter and not decisive here. This is a case of disputed fact, as well as fact; as LORD PARKER, C.J., said it is a case where the order impugned is not an order of any court but an official of the executive, as indeed was the Governor in the Nigerian case (2). I come back finally, therefore, to the wording of Sch. 1 to the Act of 1962 as a matter of plain interpretation.

I am unable to accept that the construction of para. 1 (2) of that schedule imposes any statutory onus on the applicants. If that be right, then in my view ordinary principles apply, and it is for the respondent to bear the onus of proving that the conditions precedent to the validity of the giving of the notice were satisfied, just as it would be for the respondent to prove the charge if the applicants were charged under s. 4 of the Act of 1962 with an offence of remaining in this country in defiance of an immigration officer's refusal of permission. I would accede to the motion and order that the writs be issued.

I say only that in being compelled to this conclusion I am comforted by the change made by the Act of 1968 to which I have referred in the substitution of 28 days for 24 hours as the period within which the immigration officer may examine.

Applications allowed.

Solicitors: *Kleinman, Klarfeld & Co.*; Treasury Solicitor.

T.R.F.B.

- (1) [1941] 3 All E.R. 388; [1942] A.C. 284; affg. [1941] 3 All E.R. 104; [1942] 1 K.B. 87.
(2) [1931] A.C. 662; [1931] All E.R. Rep. 44.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., ASHWORTH AND WILLIS, JJ.)

December 12, 1968

EARL v. ROY

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Specimen of blood—Division into parts—Part to be capable of analysis—Congealment before analysis—Road Traffic Act, 1962 (10 & 11 Eliz. 2 c. 59), s. 2 (4).

A specimen of blood provided by a defendant under s. 2 (4) of the Road Traffic Act, 1962, must be one which is capable of analysis. Accordingly, a specimen of blood which congeals before it can be analysed at the earliest possible moment is not a sufficient specimen.

CASE STATED by Carlisle justices.

On 1st February 1968 an information was preferred by the respondent, Donald Roy, a police officer, against the appellant, John Earl, charging that he at 1.50 a.m. on Sunday, 14th January 1968 when driving a motor car, viz., a Morris Oxford, registered number RHH 498, on a road, namely, Caldewgate, Carlisle, had consumed alcohol in such quantity that the proportion thereof in his blood exceeded the prescribed limit contrary to s. 1 (1) of the Road Safety Act 1967.

On the hearing of the information at Carlisle Magistrates' Court on 22nd March 1968, the following facts were found. On 14th January 1968 the appellant drove a Morris Oxford motor car on a road namely Caldewgate in Carlisle. The appellant whilst driving the vehicle was stopped by a police officer and having failed to complete a breath test he was cautioned and told that he was being arrested and was removed to police headquarters. At police headquarters he again failed to complete a breath test, whereupon at 2.10 a.m. on 14th January 1968 he was warned by a police inspector that a blood test was required and that failure to provide one was an offence. The appellant consented and the inspector told the appellant that he (the appellant) would be provided with part of that specimen in a capsule provided by the police. The breath testing device employed was approved by the Home Secretary for the purposes of Part 1 of the Road Safety Act 1967. At 2.25 a.m. on 14th January 1968 a police surgeon duly took a blood sample from the lobe of one of the appellant's ears. A lancet was inserted and a small insertion made. Three separate squeezes of the ear lobe were made by the doctor, the blood being collected into three separate capsules. Whilst the surgeon was taking the sample the appellant made to get off the chair on which he was sitting whereupon the surgeon said "Hold it, one more for you". Immediately after the sample was taken one of the capsules was put into an envelope, which was sealed and signed by the doctor, and handed to the appellant. On 15th January 1968 the remaining two capsules of blood were sent to the forensic science laboratory at Preston. On 17th January 1968 one of the capsules was analysed at the forensic science laboratory by a duly authorised analyst and was found to contain 97 milligrammes of alcohol to 100 millilitres of blood. He was unable to analyse the blood in the remaining capsule because there was insufficient blood in it and what there was had congealed. He could have analysed a small sample if it was still liquid. The capsule of blood given to the appellant was carried on his person or left lying about at his house from 14th January until 9th February without any steps being taken to prevent deterioration. On 9th February 1968 an independent qualified analyst received through the post by recorded delivery a letter from the appellant enclosing the capsule of blood which

had been handed to him with the request that it be analysed for its alcohol content. The analyst made a close visual examination of the capsule without opening it, and it appeared not to have been tampered with. The analyst was unable to analyse the sample because it had congealed, and there was in any event insufficient sample for him to analyse it using his method of analysis.

It was contended by the appellant: that the evidence of the forensic science laboratory analyst was inadmissible (an objection as to the admissibility of his evidence having been taken at the trial but overruled). Section 2 (4) of the Road Traffic Act 1962 provided that—

“Where the accused, at the time a specimen of blood . . . was taken from . . . him, asked to be supplied with such a specimen, evidence of the proportion of alcohol . . . found in the specimen shall not be admissible on behalf of the prosecution unless—(a) the specimen is either one of two taken . . . on the same occasion or is part of a single specimen which was divided into two parts at the time it was taken . . . and (b) the other specimen . . . was supplied to the accused.”

That the appellant having been told by the inspector that he would be provided with a specimen, having been told by the surgeon as the specimen was being taken to “Hold it—one more for you”, and that having been duly handed a sample immediately after it had been taken the appellant must be deemed to have asked for such a specimen and that any other interpretation of the actions and words of the police inspector and police surgeon were unreasonable and contrary to common sense. That s. 2 (4) of the Road Traffic Act 1962 had not been complied with in that the sample had not been divided into two parts but had been divided into three parts. Apart from the fact that this section had to be complied with strictly by the prosecution, this would have been a contributory factor why out of the three capsules there was only enough blood in one for it to be capable of analysis. That in any event s. 2 (4) (b) had not been complied with in that the specimen handed to the appellant was so inadequate that it was incapable of analysis and that it was incumbent on the prosecution to supply the accused not merely with a sample but with an adequate sample.

It was contended on behalf of the respondent: that the provisions of s. 2 (4) of the Road Traffic Act 1962 only applied where the accused, at the time a specimen was taken from him, asked to be supplied with such a specimen and the appellant had not made such a request. That s. 2 (5) of the same Act made provision for the situation where an accused did not make a request and that therefore in relation to s. 2 (4) the contention of the appellant that there was a “deemed request” could not apply. That the provisions of s. 2 (5) of the same Act had been complied with. That even if s. 2 (4) of the Road Traffic Act 1962 did apply, the Act did not prescribe division into equal parts and therefore the proportion retained by the police might be regarded as one part and that handed to the appellant the other. That the Road Traffic Act 1962 did not prescribe a minimum quantity for a specimen and that in any event the appellant had not proved that that specimen was incapable of analysis but merely that the analyst engaged by him was unable to analyse it using his method. That the sample had merely become inadequate by virtue of the manner in which the appellant had kept it from 14th January to 9th February and that by virtue of the delay any analysis would have been less accurate than an earlier one.

The justices were of the opinion that when the police inspector told the appellant that he (the appellant) would be supplied with part of any specimen provided the inspector was making an offer in compliance with s. 2 (5) of the Road Traffic Act 1962. At the time the specimen of blood was taken the appellant did not ask

to be supplied with such a specimen and therefore the provisions of s. 2 (4) did not apply. If s. 2 (4) did apply, it did not require the specimen to be divided into two equal parts; that the two capsules retained by the police constituted one part of the specimen, and the capsule handed to the appellant the other. The manner in which the appellant stored his capsule of blood was the most probable cause of its being congealed at the time it was received for analysis. Had it not been congealed, the sample of blood could have been analysed, though not by the methods employed by the analyst engaged by the appellant. The evidence of the proportions of alcohol found in the specimen of blood provided by the appellant was inadmissible. The justices therefore convicted the appellant; fined him £20, ordered him to pay £17 17s. for costs, and disqualified him from holding or obtaining a licence for driving motor vehicles for one year. They also ordered that particulars of the conviction be endorsed on any licence held by the appellant. The appellant now appealed on the following grounds. (i) That the justices were wrong in law in holding that notwithstanding that the sample of blood supplied to the appellant could not have been analysed by the analyst engaged by the appellant, the appellant was nevertheless supplied with a proper sample pursuant to the Road Traffic Act 1962. (ii) That the justices were wrong in law in finding that the sample of blood supplied to the appellant could have been analysed on the ground that there was no evidence to support such a finding. (iii) That the justices were wrong in law in finding that the manner in which the appellant stored his capsule of blood was the most probable cause of its being congealed at the time it was received for analysis on the grounds that there was no evidence to support such a finding.

E. S. Cazalet for the appellant.

G. K. Naylor for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county borough of Carlisle who convicted the appellant of an offence contrary to s. 1 (1) of the Road Safety Act 1967, the allegation being that on analysis there was found to be 97 milligrammes of alcohol to 100 millilitres of blood as against the prescribed limit of 80 milligrammes. A number of points were taken before the justices, many of which have now disappeared in the light of earlier decisions of this court. But there is one remaining point which concerns the sufficiency of the specimen of blood which was handed to the appellant. The facts, so far as they are material to that issue, are these: at 2.25 a.m. on 14th January 1968 a police surgeon duly took a blood sample from the lobe of one of the appellant's ears, the blood was collected into three separate capsules which were sealed and signed, and one of which was handed to the appellant. The next day, 15th January, the remaining two capsules of blood were sent to the forensic science laboratory at Preston, and on 17th January one of those capsules was analysed and found to contain, as I have said, 97 milligrammes of alcohol to 100 millilitres of blood. The capsule that had been handed to the appellant was carried about by him or left lying about in his house, and was not sent for analysis until 8th or 9th February. On 9th February the analyst to whom he had sent the capsule found that he was quite unable to analyse it as it was all congealed. In fact his letter to the appellant was in these terms:

"We thank you for your enquiry regarding the analysis of enclosed specimen. Regretfully we must inform you, that the sample is far too small for any accurate estimation to be carried out."

It had in fact congealed. The justices in regard to this said:

"We were of opinion that . . . the manner in which the appellant stored his

capsule of blood was the most probable cause of its being congealed at the time it was received for analysis. Had it not been congealed, the sample of blood would have been analysed, though not by the methods employed by the analyst engaged by the appellant."

The appeal here, though not stated in that form, is really an appeal, so we were told, to the effect that there was no evidence on which the justices could properly arrive at those findings, and by the agreement of counsel on both sides the court has been invited to look at the shorthand notes with which they have been supplied, and the court has allowed this point to be taken. So far as the blood being congealed was concerned, it is to be observed that the forensic laboratory was quite unable to analyse the second capsule which was sent to it because it was congealed, and that was three days after the specimen had been taken from the lobe of the appellant's ear, so it had congealed in three days. Having regard to that, I really cannot understand how the justices could properly find that the most probable cause of the blood in the appellant's capsule being congealed was the way that he had dealt with it over, not three days, but a matter of weeks. That as it seems to me of itself would be sufficient to dispose of this case, because it is the law, and indeed it is common sense, that the specimen that is provided to the appellant must be one which is capable of analysis. Something which congeals before it can be analysed at the earliest possible moment is clearly not a sufficient specimen.

As regards the second point, which is quantity as opposed to the condition of being congealed, as I said, the justices found that it could have been analysed though not by the methods employed by the analyst engaged by the appellant. It is really unnecessary, having regard to what I have already said, to deal with this point, but I confess that, reading the notes, I get the impression that there was really only just enough for the forensic laboratory to analyse on their special equipment, by what is called gas chromatography, very expensive apparatus, access to which very few, if any, analysts have. In the light of that it is difficult to see how the justices could affirmatively hold that the specimen was enough to apply analysis by other methods. In these circumstances it seems to me that this appeal must be allowed and the conviction quashed. I would only add that the justices also took the view that as the appellant had not specifically asked for a specimen, therefore none of these provisions with regard to taking specimens applied. That I think is clearly wrong, because if he did not specifically ask for it, there was no finding that he was offered it under s. 2 (5) of the Road Traffic Act 1962, and accordingly whether he asked for it or was offered it made no difference, the specimen must be a sufficient specimen to enable an analysis to be carried out.

ASHWORTH, J.: I agree.

WILLIS, J.: I agree.

Conviction quashed.

Solicitors: Collyer-Bristow & Co., for Saul & Lightfoot, Carlisle; Yelloly & Burnett, Carlisle.

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(SIR JOCELYN SIMON, P., AND BRANDON, J.)

January 23, 24, 1969

JOHNSON v. JOHNSON

Husband and Wife—Appeal—Divisional Court—Procedure—Notice of appeal—R.S.C., Ord. 55, r. 3 (2).

A notice of an appeal to a Divisional Court from an order of magistrates in a matrimonial case must specify the parts of the order complained of, what facts the appellant alleges ought to have been found, and what error has been made in point of law, whether the point was raised in the court below or not. If improper admission or rejection of evidence is alleged the evidence must be specified.

APPEAL by the husband, J. W. Johnson, from an order of Mansfield justices.

G. E. Machin for the husband.

I. T. R. Davidson for the wife.

BRANDON, J.: The grounds of appeal as stated in the notice of appeal are in the following terms: (i) That the justices were wrong in law in finding that the husband had deserted the wife, and that the wife was justified in refusing the husband's offer of resumption of cohabitation, which findings are not supported by the evidence or alternatively are against the weight of the evidence; (ii) that the justices were wrong in law in finding that the husband had wilfully neglected to maintain the wife, which finding was not supported by the evidence or alternatively was against the weight of the evidence; (iii) that the justices failed to evaluate the evidence before them.

The notice of appeal, in my view, does not comply with the rules of court. R.S.C., Ord. 55, r. 3 (2), which deals with notices of appeal in a case of this kind, provides:

"Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and if the appeal is against a judgment, order, or other decision of a court, must state whether the appeal is against the whole or part of that decision and, if against a part only, must specify that part."

That rule is similar to, but not the same as, the rule governing appeals to the Court of Appeal from the High Court and other courts. That rule is R.S.C., Ord. 59, r. 3 (2). There is a note to the latter rule in the SUPREME COURT PRACTICE 1967, vol. 1, p. 742, with regard to the requirement in the rule dealing with the specification of grounds of appeal, which reads as follows:

"This provision was introduced by the R.S.C. (Appeals), 1955. The former O. 58 did not require the grounds of appeal to be specified in the notice, although this was required by the former O. 39, r. 3, on an application for a new trial after trial with a jury. The object of the present rule is in all cases to narrow the issues on the appeal, shorten the hearing and reduce costs, by a statement in the notice of appeal of the findings of fact and points of law which will be in issue on the appeal and of the precise order which the Court of Appeal will be asked to make. To that end the appellant (having specified the parts of the judgment or order complained of) will also state what facts he alleges ought to have been found, or what error has been made in point of law (whether the point was raised in the court below or not). So to allege 'misdirection' is insufficient: the notice must state in what manner the judge misdirected himself or the jury;...

and if improper admission or rejection of evidence is alleged, the evidence must be specified. But the notice of appeal should not be lengthy or elaborate nor contain detailed reasons . . ."

In my view, that note correctly states what ought to be the practice regarding notices of appeal, not only when the appeal is to the Court of Appeal, but also where it is from a magistrates' court to this Divisional Court, and I regret to say that not only in this case but it appears to me also in many other cases that practice is not followed. There was a time when the precedents in the practice books encouraged practitioners to state their grounds of appeal in a general form, but that is not the situation today: see the precedent in *RAYDEN ON DIVORCE* (10th Edn.), p. 1830. The matter to which I have referred is not a matter of form but a matter of substance. Compliance with the practice which I have mentioned is necessary to enable appeals to be justly disposed of. I will mention a number of reasons why this is so. In many cases the evidence is voluminous and it is desirable that both the court and the advisers of the respondent should know what are the points taken with regard to the evidence so that their attention may be concentrated on the relevant part of the evidence and not wasted on the irrelevant part. As regards questions of law it is necessary that the respondent's advisers should know what points of law are being raised so that they may prepare their case and examine the authorities and be in a position to present them to the court on the points of law so raised. It may be further that if a point of law is clearly specified it will become apparent that it was not raised in the court below or that there is a dispute whether it was raised in the court below or not. It may be possible to resolve such a dispute or to establish the facts with regard to that before the appeal instead of during the appeal or as the result of an adjournment made necessary during the appeal. A further point that has to be borne in mind is that this court has power on the application of a party to admit fresh evidence on an appeal. The circumstances in which it may do so are limited, but unless a respondent knows in relation to what findings of fact or in relation to what parts of the evidence there is a complaint which is to be brought before the appellate court, then it is difficult for the respondent to consider properly in good time whether it is a case where an application for leave to call fresh evidence might properly be made. These are some of the reasons why I say that the proper specification of grounds of appeal is not a matter of form but of substance. I dare say that one could add to the points that I have made in that regard. In saying what I have said in this case I must not be taken to be criticising any particular counsel or any particular solicitor: that is not my intention at all. What I desire to do is to bring to the attention of those who practice in this field the need to observe in this respect the rules of court and the practice as stated in the note to which I have referred.

SIR JOCELYN SIMON, P.: I agree entirely with the judgment that **BRANDON, J.**, has delivered and save that I should like to lend particular support to what he has said about the proper form of a notice of appeal and about notice to the other side of allegations with other women or other men as the case may be, there is nothing that I can with advantage add to what **BRANDON, J.**, has said. I, therefore, concur in the order that he has proposed.

Appeal dismissed.

Solicitors: *Denton, Hall & Burgin; W. A. Raine, Kirby-in-Ashfield.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND BLAIN, JJ.)

March 10, 1969

R. v. FOREST JUSTICES. *Ex parte* COPPIN AND ANOTHER

Criminal Law—Compensation—Order made by magistrates' court—No application by party aggrieved—Validity of order—Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 4 (amended as stated below).

The applicants pleaded guilty at a magistrates' court to charges of larceny. No witnesses were called, and in particular the owners of the stolen property did not give evidence. The applicants were given suspended sentences of imprisonment and each was ordered to pay compensation to the owners of the stolen property under s. 4 of the Forfeiture Act, 1870, as amended by s. 34 of the Magistrates' Courts Act, 1952, and s. 10 (1) of and para. 9 of Sch. 2 to the Criminal Law Act, 1967. On applications for orders of certiorari to quash the orders for compensation,

HELD: as no "person aggrieved" within s. 4 of the Act of 1870 had applied for compensation, the justices had no jurisdiction to make the orders for compensation, and certiorari would issue to quash them.

MOTIONS by the applicants, William Donald Coppin and Raymond John Jones, for orders of certiorari to bring up and quash orders of compensation in the sums of £500 and £400 respectively made by the Forest justices sitting at Bracknell on 1st April 1968 after the applicants had pleaded guilty to ten and eight charges respectively of the larceny of motor vehicles in respect of which each applicant was sentenced to suspended sentences of six months' imprisonment.

B. B. Rathbone for the applicants.

J. I. Murchie for the respondents.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the applicants, William Donald Coppin and Raymond John Jones, for orders of certiorari to quash certain orders made on 1st April 1968 by the petty sessional division of the Forest sitting at Bracknell whereby they ordered the applicants Coppin and Jones to pay sums by way of compensation namely £500 and £400 respectively.

The matter arose in this way, that on 1st April 1968 the applicants appeared before the magistrates' court, it being known in advance that they were going to plead guilty, and they did duly plead guilty, the applicant Coppin to ten charges and the applicant Jones to eight charges of the larceny of motor vehicles. On each of these 18 convictions, the court sentenced them to six months' imprisonment which was suspended and in each case ordered the applicant to pay £50 by way of compensation. In addition, the vehicles concerned were restored under an order of restitution to their owners. It being known that the applicants were going to plead guilty, no witnesses were called and in particular the owners of the vehicles concerned were not called.

The first point taken here is that the magistrates' court had no jurisdiction whatever to make orders for compensation, because there was no person aggrieved before them. Section 4 of the Forfeiture Act 1870, which applied originally only to quarter sessions and assizes, has been extended to magistrates' courts by s. 34 of the Magistrates' Courts Act 1952. Section 4 of the Act of 1870 provides:

"It shall be lawful for any such court as aforesaid, if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding [£400], by way of satisfaction or compensation for any loss of property

suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted . . ."

As it seems to me, though highly technical, this is a fatal point. There was no person aggrieved who made any application before the justices. Counsel for the respondents says: the prosecution were asking for compensation for the owners and on behalf of the owners. There was not a shred of evidence that they were authorised to make any application by the owners and it is not really suggested. Indeed what really happened, and this shows how unmeritorious this case is, is that the applicants' solicitor feeling that they were at risk of imprisonment and seeking to secure their liberty, informed the court that the applicants would like to pay compensation. It was as the result of that that the justices made the orders for compensation. There is a conflict of evidence on the affidavits as to this; for myself I have no hesitation in accepting the evidence of the chairman of the bench, Mr. Allen, supported as it is by the prosecuting solicitor. It seems to me that the bench were persuaded to do this by the defence in order to secure the liberty of the applicants, and this they did. It is impossible, of course, to say what would have happened if the justices had realised that they could not make orders for compensation; they might well have committed to quarter sessions, they would certainly have been entitled to do, and it may well be that quarter sessions would have imposed a longer and immediate term of imprisonment.

The second point taken, which one need only deal with quite shortly having regard to the first, is that the justices, if they had jurisdiction, never exercised their discretion in the matter judicially in that they acted without any evidence of loss at all. As I have said, these cars were restored so far as possible to their owners, and there is no specific evidence that any owner ever lost anything; in fact having regard to the fact that these cars had been what is called "cannibalised", it is perfectly possible that an owner would have got back something more valuable than was stolen from him. Finally, it may well be that the real losers here were the purchasers to whom the applicants had sold the vehicles who had to give back their title in the vehicles. However, that as it seems to me is a second and subsidiary point; the real point here is that the justices had in the circumstances no jurisdiction to make these orders. That does not conclude the matter, because there is a discretion finally in this court, and if the matter rested with me alone I think it only right to say that I would not exercise the discretion of this court in favour of orders of certiorari. I understand, however, that I am in a minority and accordingly, as it seems to me, the orders will have to go.

MELFORD STEVENSON, J.: With regret I agree.

BLAIN, J.: With equal regret I agree.

Order for certiorari.

Solicitors: *Bryan Williams, Ascot; E. R. Davies, Reading.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., EDMUND DAVIES, L.J., AND CAULFIELD, J.)

March 20, 1969

R. v. TAYLOR

Criminal Law—Compensation—Order at quarter sessions—No application by person aggrieved—Validity of order—Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 4, as amended.

An order for compensation under s. 4 of the Forfeiture Act, 1870, as amended, following on conviction at assizes or quarter sessions may be made only on the application of a person aggrieved.

APPEAL against sentence.

On 3rd December 1968 the appellant, Timothy John Taylor, pleaded guilty at Greater London (Middlesex Area) Quarter Sessions with two other men to two counts in an indictment charging them with (i) the larceny of lead in a building, and (ii) with maliciously damaging lead piping and plumbing fittings, the property of G.E.C. (D.E.), Ltd. to the value of some £600. He was sentenced by the deputy chairman to concurrent terms of 18 months' imprisonment and ordered to pay £100 compensation in respect of count 2 to G.E.C. (D.E.), Ltd.

F. Reynold for the appellant.

The Crown was not represented.

LORD PARKER, C.J.: The appellant pleaded guilty on 3rd December 1968 at Greater London (Middlesex Area) Quarter Sessions to two counts, the first of larceny of lead piping fixed to a building, and, secondly, malicious damage to lead piping and plumbing fittings. He was sentenced to 18 months' imprisonment on each count concurrent, and in respect of the malicious damage he was in addition ordered to pay £100 compensation to the owners of the damaged property. It is against that sentence that he now appeals by leave of the single judge.

The facts are in a very short compass. The premises in question were an office block which had been left empty for some 22 months. There was a caretaker there, however, and on 12th August 1968 he found someone had entered the building and removed door fittings on three of the floors. In looking around, however, he found that no lead piping had been removed. The very next day, at 10.20 a.m., he heard loud banging noises in the building. He called the police, and at 11.0 a.m. the police entered with a dog and found two men lying on a shed roof, part of the office building, and a third in an empty water tank nearby. The appellant was one of them, and when asked what they were doing on the roof, he said "We were only having the metal away. We didn't break into the place, the doors were open". He went on to say he was expecting to get £10 for the piping. On inspection of the premises, it was found that lead piping worth about £25 had been ripped from the first three floors and the roof, and that considerable damage had been done to the building, indeed the cost of repairing the plumbing and other items was said to be in the region of £600. It is only right to say that that figure was challenged, and that it was accepted that the appellant and the others had not been responsible for all the damage.

The appellant is 26 years of age, married with two children, and indulged in 1964 and 1965 in an orgy of breakings and as a result in January 1966 he was sentenced to a total of 12 months' imprisonment for four breakings and stealings when he also asked for 25 similar offences to be taken into consideration. It is

true that he has to some extent lived down that past by keeping clear for some two years and working, but, in the opinion of this court, the offences to which the appellant pleaded guilty are very prevalent in these days, and they can see no reason whatever for interfering with the sentence of 18 months' imprisonment.

The real point on which the single judge gave leave to appeal in this case concerned the order for compensation that was made. The power of quarter sessions to make an order for compensation is to be found in s. 4 of the Forfeiture Act 1870 which (as amended) provides:

"It shall be lawful for any such court as aforesaid, if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding £400 pounds, by way of satisfaction or compensation . . ."

There was no application on behalf of any person aggrieved for the appellant had pleaded guilty, and the prosecution did not have any witnesses present who might have applied for such an order. A similar point came before the Divisional Court on 10th March 1969, in *R. v. Forest Justices, Ex p. Coppin* (1). In that case a magistrates' court had at the invitation of the defence made orders for compensation, and since a magistrates' court now has power under s. 34 of the Magistrates' Courts Act 1952 to order compensation in the same way as a court of assize or quarter sessions could have done, the same point arose. There the court were constrained to quash orders of compensation, there having been no application made by any person aggrieved, the result in that case being that the applicants got away with a very short sentence which would no doubt have been longer had the justices realised that they could not order compensation. It is an unfortunate omission in the legislation; a magistrates' court dealing summarily with an offence has absolute power to award compensation under s. 14 of the Criminal Justice Administration Act, 1914, without any application being made by an aggrieved person, but if they are dealing with an indictable offence or quarter sessions or court of assize are dealing with the case, the compensation can be awarded only on the application of a person aggrieved. It follows, therefore, that the order in the present case must be quashed.

Appeal allowed in part.

Solicitors: *Registrar of Criminal Appeals.*

T.R.F.B.

(1) Ante p. 433.

COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS and FENTON ATKINSON, L.JJ., and CAULFIELD, J.)

March 13, 14, 1969

R. v. WEBB

Criminal Law—Trial—Issue of fitness to be tried—Postponement of issue—Exercise of discretion by judge—Letters to be answered—Nature of defendants disability—Chances of use for prosecution being successfully challenged by defence—Failure to exercise discretion—Conviction quashed—Criminal Procedure (Insanity) Act 1964 (c. 84), s. 4 (2), (3).

By s. 4 (2) of the Criminal Procedure (Insanity) Act, 1964, a court has power to postpone consideration of the question of the defendant's fitness to be tried until any time up to the opening of the case for the defence if, having regard to the nature of any supposed disability, the court is of the opinion that it is expedient to do so and in the interests of the defendant. By s. 4 (3), subject to s. 4 (2), the question of fitness to be tried is to be determined as soon as it arises.

HELD: as between s. 4 (2) and s. 4 (3), s. 4 (2) was the controlling section, and under it the judge had to exercise a judicial discretion whether or not to postpone the determination of the question of fitness till after arraignment; in exercising his discretion, the judge must apply his mind to the nature of the disability of the defendant and his chances of successfully challenging the case for the prosecution, and, if he fails to consider these matters, he has not exercised his discretion judicially.

APPEAL by Colin John Webb against an order made at Dorset Quarter Sessions by the deputy chairman under s. 5 (1) of the Criminal Procedure (Insanity) Act 1964, that, having been found before arraignment to be under a disability, he be admitted to such hospital as might be specified by the Secretary of State, and, in pursuance of Sch. 1, para. 1 (2), to the Act of 1964, that, pending such admission he be detained in Dorchester prison.

A. C. Munro Kerr for the appellant.

D. P. O'Brien for the Crown.

SACHS, L.J., delivered the judgment of the court: On 1st January 1969, the appellant, a young man of 26, surrendered to his bail at Dorset Quarter Sessions to answer an indictment charging him with indecently assaulting a girl aged nine. Immediately after the case was called on, counsel for the prosecution stated that there was available evidence to the effect that the appellant was unfit to plead, being of a mental age incidentally of less than the girl whom he was alleged to have assaulted. Counsel for the appellant did not admit that he was thus unfit to plead, and pressed for him to stand his trial in the ordinary way. Indeed, counsel, with the great experience that is at his command, stated that he was content to accept instructions from the appellant, and today has repeated that he would even now be similarly content. He put it plainly to Dorset Quarter Sessions that he did not wish the issue of unfitness to plead to be raised if it was possible to prevent it, and that, in any event, he desired it to be postponed as long as practicable. After some discussion as to the facts and the position created by s. 4 of the Criminal Procedure (Insanity) Act 1964, counsel for the appellant correctly conceded that the question of unfitness to plead must be tried some time before the defence opens; thereupon the learned deputy chairman ruled: "Yes. That being so, it shall be tried now". The jury having then been sworn and empanelled, the preliminary issue of fitness or unfitness to plead was tried. The medical witnesses—two in number—were called for the prosecution and cross-examined for the defence. Next there was called the appellant's father, who spoke as to the

degree of his son's understanding. Then the jury were directed on the issue, and found that the appellant was unfit to plead. (It should be mentioned that counsel for the appellant in this court has stated that he would have wished to impugn some parts of the summing-up to the jury; but in the view which this court takes of the matter, that point does not arise.) The verdict of the jury having been taken, the appellant was ordered to be detained in the terms provided by the Act, and the trial did not proceed to arraignment.

On appeal to this court, it has been submitted on behalf of the appellant that the learned deputy chairman misapprehended the law when making his order for the issue to be tried before arraignment, and that he either did not really exercise his discretion or, alternatively, that, having misdirected himself on principles, he did not exercise it judicially in the way that he should have done. It is further submitted that, on the particular facts of the case, the trial of the issue should have been postponed until after the evidence by the prosecution had been given and tested, so that the appellant might have had a chance of an acquittal.

In those circumstances, before further examining the facts of the case, it is first convenient to read the relevant parts of s. 4 of the Act of 1964, and to consider what is the position which they create in law. The first three subsections of s. 4 provide:

"(1) Where on the trial of a person the question arises (at the instance of the defence or otherwise) whether the accused is under disability, that is to say under any disability such that apart from this Act it would constitute a bar to his being tried, the following provisions shall have effect.

"(2) The court, if having regard to the nature of the supposed disability the court are of opinion that it is expedient so to do and in the interests of the accused, may postpone consideration of the said question (hereinafter referred to as 'the question of fitness to be tried') until any time up to the opening of the case for the defence, and if before the question of fitness to be tried falls to be determined the jury return a verdict of acquittal on the count or each of the counts on which the accused is being tried that question shall not be determined.

"(3) Subject to the foregoing subsection, the question of fitness to be tried shall be determined as soon as it arises."

Before the passing of the Act of 1964, the issue of fitness to plead had of necessity to be disposed of before arraignment. If the jury found unfitness to plead, then the order of the court was in all cases that the appellant be detained at Her Majesty's Pleasure. One of the main objects of the Act was, of course, to enable the accused to avoid this much-dreaded order in cases where the defence was in a position to demolish the prosecution case by cross-examination or on some point of law before the time came for the defence to be opened. It was for this reason that the courts were given the discretion provided by s. 4 (2) of the Act of 1964 to so postpone the trial of the issue of fitness to plead that it need no longer, as formerly, be of necessity dealt with before the arraignment. The direction in sub-s. (3) as to the question being tried as soon as it arises is specifically made subject to the provisions of sub-s. (2) which precedes it; and it follows as between these two that it is sub-s. (2) which is the controlling subsection. The discretion to be exercised is, of course, a judicial discretion.

The court next turns to the matters to which regard must be had by virtue of the provisions of the latter subsection. One is the nature of the supposed disability; another is expediency in the interests of the accused. As regards the second, it is, of course, clear that, if there are reasonable chances of the prosecution case being successfully challenged so that the defence may not be called on, then

clearly it is as a rule in the interests of the accused that trial of the issue be postponed until after arraignment. Whether, and to what degree, lesser chances of success may warrant such a postponement is something on which this court will say no more than that, if there are sufficient chances to warrant such a challenge, the issue should be postponed until after that challenge has been made. To the relevant facts of this particular case the court will advert later; for each case must necessarily obtain on its own facts.

As to the way in which regard must be had to "the nature of the disability", this is a somewhat difficult matter. Suffice it to say that, in the present case, the appellant was, on the medical evidence, a simple young man, subnormal in intelligence, but capable of going about—at any rate by day—on his own. He was in employment entailing the performance of a simple set of tasks—washing bottles. It may well, of course, be that he owed that employment in some degree to the kindness of his employer, but the fact remains that he had held it for a considerable time. It is, indeed, to be observed that, in the report of the mental welfare officer, there appears this passage:

"In 1960 [the appellant] started work at the Rax Dairies, Bridport, under a firm but sympathetic employer. He enjoyed his work, and settled down well at home. Apart from one or two isolated incidents [the appellant] has been happy and settled over the past eight years."

The appellant, moreover, was in no way an aggressive type, nor was he a man unable to speak or to give at any rate some account of what happened to him in the normal course of events. There was nothing in the nature of a disability which would entail his being kept within the confines of a hospital, if he was found not guilty of the offence in question. In other words, in this particular instance, the appellant was not a man of whom it could be said, "well, whatever happens at this trial, it is necessary that he be made a subject of some order depriving him of his liberty". That appears to this court to be a factor to which regard should have been had.

From that general consideration of the law, the court now turns to the issue whether the learned deputy chairman did exercise a discretion, and, if so, whether he exercised it judicially in the sense of taking into account all those factors to which he ought to have had regard. It is to be noted that, when another division of this court gave leave for this appeal to be brought, WINN, L.J., said:

"... it is an arguable view that the learned deputy chairman apparently applied [sub-s. (3)] without further regard to the provisions of sub-s. (2) ... In the opinion of this court it may be open to contend that the learned deputy chairman did not purport to exercise any discretion. From the transcript so far as that reveals what happened, it is open to doubt whether the truth may be that he did not himself at the time consider that he had any discretion which it was his duty to exercise."

This court has now had the advantage of hearing from both counsel concerned that there was cited, and apparently discussed at some length at quarter sessions *R. v. MacCarthy (or McCarthy)* (1). In particular, we have been told that there was discussion of the headnote and certain passages in that case. Suffice it to say that, although that case was in no way concerned with the exercise of a discretion under sub-s. (2), yet this court does understand that the general effect of it might have per incuriam been taken persuasively to indicate a need in the instant case to act under sub-s. (3) (which refers to the determination of the issue as soon as it arises) and to have the issue tried before arraignment. This court thinks that it

(1) 130 J.P. 157; [1966] 1 All E.R. 447; [1967] 1 Q.B. 68.

may well be that the learned deputy chairman did not consider that he had a real discretion in all the circumstances; but, more importantly, it seems quite clear that he was not applying his mind to those factors which have already been discussed in the judgment of this court. In particular, he cannot have applied his mind to the nature of the disability. Moreover, the chances of success of a challenge to the prosecution case by the defence, whilst to some extent discussed, do not seem to have been given proper weight, a point to which this court will revert. In those circumstances, this court has come to the conclusion that the exercise of the purported discretion was vitiated in law and, accordingly, subject to the proviso to which this court will now refer, the appeal should be allowed.

The appeal, of course, is one brought within the jurisdiction of this court by s. 15 and s. 16 of the Criminal Appeal Act 1968. It is not necessary to recite the provisions of s. 15 which give the right to appeal; but it is necessary to refer to some extracts from s. 16, which provides:

"(1) The Court of Appeal shall allow an appeal under section 15 of this Act if they are of opinion—(a) that the finding of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or (b) that the order of the court giving effect to the finding should be set aside on the ground of a wrong decision of any question of law [and that, of course, is the ground on which this court is acting today]; or (c) that there was a material irregularity in the course of the determination of the question of fitness to be tried; and in any other case (except one to which subsection (2) below applies) shall dismiss the appeal; but they may dismiss the appeal if of opinion that, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, no miscarriage of justice has actually occurred."

Before passing to the proviso to s. 2 (1) of the Act of 1968 (which, of course, is substantially in identical terms with that to s. 4 (1) of the Criminal Appeal Act 1907), it is perhaps as well to mention that s. 16 (2) of the Criminal Appeal Act 1968 relates to a case that does not arise today.

It is now convenient, when considering the question of the proviso, to turn back to the facts. When the matter was before this court on 6th February 1969, WINN, L.J., dealt with them thus:

"[The appellant] was charged with indecent assault upon a little girl of nine. There was some corroborating evidence, but that evidence itself was in the nature of it susceptible of probing and challenge during cross-examination by experienced counsel [I would remark that he clearly had in mind counsel for the appellant]; the child's own evidence needed corroboration and was, of course, the sort of evidence as to which the jury would require as a matter of law to be seriously warned, she being only nine years of age."

To that passage there could have been added—had the material been before the court on that occasion—first, that the prosecution conceded that the initial advances were made by the little girl herself, and, secondly—as the court has now been informed—that counsel for the appellant felt himself in a position to challenge some of this corroborative evidence by reference to plans and other material which might throw doubt on whether he could have seen all that he in fact said he saw. To continue with the passage from WINN, L.J.:

"... there were issues which would require to be explored and tested, and upon which an outcome successful to the [appellant] was not out of contemplation. That being so, there was a chance that by contesting the factual

issues and attacking the evidence for the Crown, an acquittal might have been secured for [the appellant], and it would clearly have been in his interests if that acquittal could have been secured; it would have been from his point of view expedient to have an opportunity for the evidence to be tested before his disability fell to be determined by a jury."

With those passages as to the chances of successfully challenging the Crown's case this court respectfully agrees. That being the position, there can clearly be no question of applying the proviso; far from it being a case in which the court could come to the conclusion that no miscarriage of justice had occurred, it is clear that the facts already mentioned provide strong grounds why the learned deputy chairman should have exercised his discretion to postpone the trial of the issue of fitness to plead. In those circumstances, this appeal will be allowed.

It is, perhaps, as well, before this court turns to ancillary points, to make it plain that naturally its decision has turned on the particular facts of this case. There may well be cases where the nature of the disability is quite different, and there may well be cases where the evidence for the prosecution is of a type which simply could not be successfully challenged. Those would be cases in which the relevant factors would be different.

The next question that arises is as to what order this court should now make. Section 16 (3) provides that:

"... where an appeal under section 15 of this Act is allowed, the appellant may be tried accordingly for the offence with which he was charged, and the Court of Appeal may make such orders as appear to them to be necessary or expedient pending any such trial for his custody, admission to bail or continued detention under the Mental Health Act 1959 ..."

It is to be observed that the words are "may be tried" and not "will be tried". This court would hope that considerable and anxious consideration will be given by the Crown whether to offer evidence when the indictment next comes before sessions. That, however, does not absolve this court from deciding what is the proper order to make, both as regards bail and as to what is to happen between the date of the order of this court and the date the matter next comes before sessions. On that, the court would like the assistance of counsel.

[14th March. The court ordered that the appellant be released on bail pending his trial and recognizances were fixed.]

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield*, for *Roper & Roper*, Bridport; *Sharpe, Pritchard & Co.*, for *J. R. Pryer*, Dorchester.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., EDMUND DAVIES, L.J., AND CAULFIELD, J.)

March 25, 1969

R. v. HARRIS

Criminal Law—Indictment—Same incident made subject-matter of several charges—Conviction by jury of both graver and lesser offences.

The same incident should not be made the subject-matter of distinct charges, in the sense that it should not be left open to a jury to convict of both a graver and a lesser offence arising out of the one incident.

APPLICATION by John Harris for leave to appeal against his conviction at Manchester Crown Court of buggery on a boy aged 14 and of indecent assault on the same boy. Both charges arose out of the same incident. The applicant was sentenced to seven years' imprisonment for the buggery and to five years' imprisonment concurrent for the indecent assault. It was also ordered that a sentence of six months' imprisonment for attempted false pretences imposed at Wiltshire Quarter Sessions on 3rd July 1968, which was suspended for six months, should take effect consecutively to the other sentence.

No counsel appeared.

EDMUND DAVIES, L.J., in giving the judgment of the court, said: In relation to conviction, the summing-up of the learned commissioner was thorough, careful and fair and the jury had their minds properly directed to the issues that they had to bear in mind and the evidence which related thereto. It is impossible to say that they were not entitled to come to the conclusion that the charge of buggery was made out. The application in relation to that offence is, accordingly, refused.

But this court observes that the applicant was convicted not only on the full charge but also on the lesser (though still grave) charge of indecent assault on the same boy in relation to the same incident, and that he was sentenced in respect thereof to a concurrent term of five years' imprisonment. It is perfectly clear on reading the transcript that the two charges related to one and the same incident. There is no suggestion of any indecent assault on this same boy except that which formed the preliminary to and was followed very shortly thereafter by the commission of the full act of buggery. It does not seem to this court right or desirable that one and the same incident should be made the subject-matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue. We, accordingly, allow the application for leave to appeal against the conviction of indecent assault, which really merges into the conviction for the graver charge. Having granted leave, we treat this as the hearing of the appeal in relation to the indecent assault conviction and quash that conviction, but refuse leave to appeal in respect of the buggery conviction.

Conviction quashed in part.

COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES AND PHILLIMORE, L.J.J., AND GEOFFREY LANE, J.)

January 17, 1969

R. v. BRADBURY

Criminal Law—Presumption of guilt—Direction to jury.

At the trial of the appellant for unlawful sexual intercourse with a girl aged 15 the judge, following a passage in ARCHBOLD'S CRIMINAL PRACTICE (36th ed.) p. 1001, based on *R. v. Stoddart* (1909), 73 J.P. 348, directed the jury that where the prosecution called evidence from which the defendant's guilt might be presumed, and, therefore, called for an explanation from the defendant, or where the defendant gave an answer or explanation which the jury rejected as being untrue, a presumption was raised on which the jury might be justified in returning a verdict of guilty.

HELD: as the jury had not been told, either before or after this explanation, that they had to be sure, or had to be satisfied beyond all reasonable doubt, before they could convict, the explanation was too complicated and might have misled the jury, and the conviction of the appellant must be quashed.

APPEAL by Ronald William Bradbury against his conviction at Hertfordshire Quarter Sessions of unlawful sexual intercourse with a girl aged 15, contrary to the Sexual Offences Act 1956, s. 6 (1), when he was sentenced to two years' imprisonment.

J. G. Connor for the appellant.

M. R. Wilkinson for the Crown.

EDMUND DAVIES, L.J., delivered the judgment of the court: This appeal is allowed. On 5th July 1968 at Hertfordshire Quarter Sessions, the appellant, Ronald William Bradbury, was convicted of unlawful sexual intercourse with a girl aged 15 and he received a sentence of two years' imprisonment. With the leave of the single judge, he now appeals against that conviction.

The girl gave evidence that, on the evening of 9th September 1967, she then, being 15 years of age, was in a public house with the appellant when he suggested a walk. They went into a field, had intercourse and she became pregnant as a result. She gave evidence about what had happened in regard to the removal of her clothing before the act of intercourse which was said to be inconsistent with what she had said on another occasion, and there were other alleged discrepancies in her account of what had transpired. The appellant in evidence said that the walk was the girl's idea, that her attentions when they went out were very pressing, but that, nevertheless, they only kissed, although she obviously wanted intercourse. The girl had testified that, when they got back to his car, the appellant asked her how old she was and she replied that she was 15, his version being that she had told him she was 17. In the following November, the girl met the appellant and told him that she was pregnant. He retorted that it was not his baby and that she would have to take him to court. He told the police later that he had not had intercourse, but that he could bring along half-a-dozen fellows who had had intercourse with the girl. At his trial, he said that she had acted with great sexual precocity towards him.

There was no corroboration, and the jury were impeccably directed on the desirability for it and as to its complete absence. But the ground on which we allow this appeal (and do not accede to the invitation of the Crown to apply the proviso to s. 2 (1) of the Criminal Appeal Act, 1968) arises from the direction in relation to the burden and standard of proof. The learned deputy chairman said:

"That simply means that where an accused person has pleaded not

guilty the prosecution is obliged to prove upon trial in effect each circumstance stated in the indictment which is material and necessary to constitute the offence. I have already told you that there are only two facts or circumstances in this indictment which are material and necessary to constitute this offence . . . The rule is that the burden of proving guilt lies upon the prosecution and it is not for the accused to prove his innocence."

So the learned deputy chairman had unquestionably placed the burden on the right shoulders. But then he went on:

"What is meant by 'prove' in that context? The answer is that where the prosecution call evidence from which the guilt of the accused might be presumed, and which therefore calls for an explanation by the accused and the accused does not give an answer or explanation, or gives an answer or explanation which the jury rejects as being untrue, a presumption is raised upon which the jury may be justified in returning a verdict of guilty. If the accused gives an explanation which raises in the minds of a jury a reasonable doubt as to his guilt, then the accused is entitled to be acquitted because if, upon the whole of the evidence in the case, the jury is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof that lies on them. So much for the burden of proof."

In our judgment, too much was thus said about the burden of proof and what was said was too involved. A much shorter direction would have been more helpful. The jury should have been told in terms, not only that the burden was on the prosecution (as they most certainly were directed), but also that, in the last resort, they had to be satisfied beyond all reasonable doubt (or that they had to be sure of the guilt of the appellant) before they could convict.

What the learned deputy chairman did here, it is quite clear, was to quote from the second sub-paragraph of para. 1001 of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.). It is a very useful passage for the legal practitioner and the judge to have in mind. It is an amalgam of several citations from the decision of LORD ALVERSTONE, C.J., in *R. v. Stoddart* (1). But we venture to think that those portions of it which in particular refer to "a presumption being raised on which the jury may be justified in returning a verdict of guilty" are not such as one should contemplate citing to a jury. They are not calculated to help them; indeed, they have an unfortunate tendency to confuse, rather than to elucidate, and to lead a jury to the conclusion that, if an accused man gives an explanation which they reject, the step towards convicting him is short and well-nigh inevitable. The citation of this somewhat involved passage could, nevertheless, have been cured had there been, either before or after it, as we have already said, a bald direction in such terms as, "You have to be sure in this case before you can convict" or "You have to be satisfied beyond all reasonable doubt before you can convict". But, unhappily, a direction in those familiar, simple terms intelligible to the jury was never employed.

There being no corroboration, this case called for a particularly clear and simple direction on the lines we have indicated. Instead, the learned deputy chairman, by a verbatim quotation from a standard work in daily use by legal practitioners, employed words likely to prove confusing to the laymen who constituted the jury. This is regrettable, but, in our judgment, the result must be that this appeal against conviction is allowed.

Appeal allowed.

Solicitors: *Registrar of Criminal Appeals; Lathom & Co., Luton.* T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON AND FENTON ATKINSON, L.JJ., AND MILMO, J.)

December 13, 16, 1968

R. v. FLACK

Criminal Law—Trial—Separate trials—Offences of similar character—Defence complete denial of incident—Admissibility of evidence of sexual offence against one person not admissible on counts charging similar offences against other persons—Discretion of trial judge—Indictments Act, 1915 (5 & 6 Geo. 5 c. 90), s. 4, Sch. I, R. 3.

Evidence of a sexual offence against one person is admissible on counts charging similar offences against other persons where a question of identity, intent, system or guilty knowledge arises or to rebut a defence of innocent association, but it is not admissible where the defence is a complete denial that the alleged incident occurred.

The appellant was charged in count 1 of an indictment with incest with his sister E. in 1964, in count 2 with incest with his sister S. in 1965-6, and in count 3 with incest with his sister C. in 1967. The alleged offences were of the same or a similar character. The trial judge, having formed a provisional view that evidence of the alleged offence against any one sister would be evidence on consideration of the alleged offences against the other two, exercised his discretion under s. 4 of r. 3 of Sched. I to the Indictments Act, 1915, by ordering the three counts to be tried together, but held that, even if his provisional view was wrong, the three counts still should be tried together.

HELD: that though in similar circumstances it might usually be better that the counts should be tried separately, the Court of Appeal would not interfere with the exercise of the judge's discretion in ordering a joint trial.

APPEAL against conviction by Ronald Edward Cyril Flack who had been convicted at Sussex Assizes before BLAIN, J., of incest, and was sentenced to concurrent terms of seven years' imprisonment. The appellant was tried on an indictment containing three counts, each alleging incest. The first count charged him with having sexual intercourse with his sister Evelyn, who was then 15, between 1st June and 21st November 1964. The second count charged him with having sexual intercourse with his sister Sheila, then aged between 12½ and 14, at some date between 1st April 1965 and 13th October 1966. The third count charged him with having sexual intercourse with his sister Carole, who was then 13½, on 26th May 1967. He was convicted by the jury on the first and third counts, and acquitted on the second count.

J. H. Gower, Q.C., and R. J. Seabrook for the appellant.

B. L. Charles for the Crown.

SALMON, L.J., delivered the following judgment of the court: Before the trial commenced, it was submitted on behalf of the appellant that each count should be tried separately. The learned judge ruled that they should be tried together. The first point taken is that that ruling was wrong, and that on this ground the convictions should be quashed. Clearly, the three counts alleged a series of offences of the same or similar character; accordingly, it is plain that there was power to order these counts to be tried together (see s. 4 of the Indictments Act 1915, and Sch. 1, r. 3, to that Act). That being so, it became a matter for discretion of the learned judge whether he should allow the counts to be tried together or order them to be tried separately. That is a discretion which this court has said, on more than one occasion, it will not overrule unless it can see that justice has not been done or unless compelled to do so by some overwhelming fact. Of course, if the learned judge gives a reason

which obviously was a bad reason, the court may review his decision. It will not do so however if it is of the opinion that in all the circumstances the charges might well have been tried together, although the reason given by the judge was wrong (*R. v. Hall* (1)). In the present case, counsel on behalf of the appellant argues very persuasively that the reasons given by the learned judge for allowing the counts to be tried together were wrong. In giving his ruling, the learned judge certainly indicated that at that stage at any rate he had formed the provisional view that evidence of the alleged offence against any one girl would be evidence of the alleged offences against the other two. He added, however, that he could not forecast definitely whether he would remain of the same view at the conclusion of the evidence.

Counsel for the Crown has sought to support the learned judge's provisional view with passages from the judgments of LORD GODDARD, C.J., in *R. v. Sims* (2) and *R. v. Campbell* (3). Counsel has very frankly conceded that these passages—at any rate at first sight, if unqualified—appear to be rather startling, a view with which this court is certainly disposed to agree. In *R. v. Sims* the accused was convicted on three counts, each alleging buggery with a different man. In *R. v. Campbell* the accused was convicted on seven counts, each alleging indecent assault on a different boy. The passage in *R. v. Sims* relied on by the Crown read as follows:

"The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that the interests of justice require that on each case the evidence of the others should be considered, and that even apart from the defence raised by him, the evidence would be admissible."

The passage in *R. v. Campbell* relied on by the Crown is shorter, but to much the same effect, and reads as follows:

"At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story."

These passages seem to suggest that, whenever a man is charged with a sexual offence against A., evidence may always be adduced by the Crown in support of that charge of similar alleged offences by the accused against B., C. and D. This court does not think that those passages were ever intended to be so understood. If, however, this is their true meaning, they go much further than was necessary for the purpose of the decisions, and cannot, in the view of this court, be accepted as correctly stating the law.

In *R. v. Sims* (2), the accused had admitted that he invited each of the men to his house. He said he had done so solely for the purpose of conversation and playing cards. Each man said he had been invited to the house for the purpose of buggery. The question was whether this was a guilty or an innocent association. As LORD GODDARD, C.J., said:

(1) 116 J.P. 43; [1952] 1 All E.R. 66; [1952] 1 K.B. 302.

(2) [1946] 1 All E.R. 697; [1946] K.B. 531.

(3) 120 J.P. 359; [1956] 2 All E.R. 272; [1956] 2 Q.B. 432.

"... the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose."

This was plainly right, and the correctness of the decision in *R. v. Sims* (1) has never been doubted. The evidence of B., C. and D. was clearly admissible against A. to negative the defence of innocent association.

In *R. v. Campbell* (2), the passage to which reference has been made was unnecessary for the decision which turned on the extent to which the evidence of one child could amount to corroboration of another. The correctness of the decision itself in *R. v. Campbell* has never been questioned. It is only the passage to which reference has already been made about which any criticism is possible. In *R. v. Chandor* (3) LORD PARKER, C.J., referring to the passage from *R. v. Campbell* which has been read, said:

"Unqualified it would appear to cover a case where the accused was saying that the incident in question never took place at all. To take an incident in the present case, the accused said that in respect of an alleged offence with a boy ... at View Point—he ... had never met the boy at View Point at all. Yet, if this passage in *R. v. Campbell* (2) is unqualified it would apply to just such a case. We do not think that the passage in *R. v. Campbell* (2) was ever intended to cover that. Indeed, so far as we know the authorities have never gone so far as that, nor do we see how they could ... There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to provide identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular incident ever occurred at all."

This court respectfully agrees with every word of LORD PARKER, C.J.'s judgment in *R. v. Chandor* (3).

In the present case, the defence consisted of a complete denial that any such incident as that to which the appellant's sisters spoke had ever occurred. No question of identity, intent, system, guilty knowledge, or of rebutting a defence of innocent association ever arose. That was plain at any rate at the conclusion of the evidence, whatever may have been the position when the application for separate trials was originally made. Accordingly, the evidence of an alleged offence against one sister could not be evidence of the alleged offences against the others. Although the learned judge had provisionally formed a contrary view before hearing the evidence, his ruling that the counts could properly be tried together did not necessarily turn exclusively on his view as to the admissibility of the evidence on each count. It seems to this court that he came to the conclusion that even if his provisional view was wrong, these three alleged offences—each falling into watertight compartments—could properly be tried together, and summed up so that the jury would not be influenced or prejudiced in considering any one count by evidence in respect of the others. This, no doubt, is a matter about which different judges might take different views. Certainly it would as a rule be better, in circumstances such as these, that the counts should be tried separately. This court will not, however, interfere with the

(1) [1946] 1 All E.R. 697; [1946] K.B. 531.

(2) 120 J.P. 359; [1956] 2 All E.R. 272; [1956] 2 Q.B. 432.

(3) 123 J.P. 131, 194; [1959] 1 All E.R. 702; [1959] 1 Q.B. 545.

decision of the judge in such a matter unless satisfied that there were no reasonable grounds on which his decision could be supported, or that it may have caused a miscarriage of justice.

In the particular circumstances of this case, this court is not so satisfied; indeed it is satisfied to the contrary. The decision of the learned judge also seems to be vindicated by the fact that the jury acquitted the accused on the second count, although the jury accepted the evidence against him on the first and third counts. Accordingly, the point based on the fact that the three counts were tried together fails. The learned judge, when he summed up to the jury, had apparently changed his provisional view that all the evidence was relevant to each count, for he stressed that they should consider each of the counts quite separately. He summed up each count independently, and reviewed the evidence which he told the jury was relevant to it. In no case when he was dealing with evidence relating to one count did he mention the other counts or the evidence which related to them alone.

Counsel for the appellant complains that the learned judge did not expressly direct the jury that when considering each count they should exclude from their minds the evidence relating to the other counts. No doubt it would have been better if he had expressly given this direction, and in most cases it would be necessary to do so. This court has come to the conclusion, however, that the direction that in considering any one count the other counts and the evidence relating to them must be ignored is necessarily implicit in the summing-up, and that undoubtedly the jury so understood it. As already mentioned, they acquitted on count 2, although they convicted on counts 1 and 3.

It is then argued on behalf of the appellant that the learned judge should have excluded as inadmissible the evidence of the indecent practice which Evelyn said she had been induced to indulge in by the appellant. It is said that this evidence could not be relevant unless psychiatric evidence had been called to prove that such conduct was likely to indicate or to lead to intercourse with Evelyn. No doubt in some cases psychiatric evidence is quite often useful, and indeed sometimes essential; but not, we think, in this case. After all a jury must be credited with some knowledge of human nature and experience of the world. The evidence of the indecency with Evelyn was clearly admissible in respect of count 1, which charged incest with Evelyn. In any event, the evidence of indecency did not carry the case much further, since it came only from Evelyn herself. If she lied about the one, she may have lied about the other. If, however, the jury believed her about the indecency, it was some evidence to support her evidence about the incest. The matter may be tested in this way: if there had been independent evidence as to indecency between the appellant and his sister Evelyn, would it have been capable of corroborating Evelyn's evidence in relation to incest? This question obviously, in the view of this court, must be answered in the affirmative.

Complaint has also been made of the judge's direction about corroboration. The court considers that the learned judge gave a full, clear and correct warning on the danger of convicting on uncorroborated evidence in a case such as the present. He also told the jury correctly that if, bearing that warning in mind, they were entirely satisfied beyond any reasonable doubt that any of these girls was speaking the truth, the jury were entitled to convict in respect of the count relating to that girl, despite the fact that her evidence was uncorroborated. It is true that the learned judge did not attempt an exhaustive, or indeed any, definition of corroboration; but this was hardly necessary since the prosecution

was conducted on the basis that there was no corroboration of any of the complainants' evidence on any of the three counts. The only criticism of the summing-up in respect of corroboration which has any substance in it is the criticism in relation to what the learned judge said about the evidence concerning the car in which Evelyn alleged that intercourse had taken place. After reminding the jury that the prosecution conceded there was no corroboration on any count, the learned judge went on to say:

"You might think that in the case of the first count, in the case of the girl Evelyn, one little item which you could regard as corroboration may have arisen out of the defence evidence, when Mr. Penfold said that he knew of a large car driven by the [appellant], a Hudson car, which had a running board. You may think that does not take it very much further, but, if you were impressed by Evelyn's description of the car, the make of which she did not know but which she described as a big car with a running board, you may think there is some little element of corroboration there; it is not great, but it is a matter for you."

This court doubts whether Mr. Penfold's evidence was capable of corroborating Evelyn's evidence. Of course, we have not seen a transcript of the evidence. If the appellant denied that Evelyn had ever been in or even seen his car, it might be otherwise; but the court is prepared to assume that there was no such evidence, and that what Mr. Penfold said was not capable of corroborating Evelyn. This court, however, is satisfied that no jury could have attached the slightest weight to Mr. Penfold's evidence, and the judge's reference to it can have made no difference to their verdict. This is a case in which they clearly concluded that they could safely convict on uncorroborated testimony. They did so on the third count. Even though the learned judge was wrong in suggesting that Mr. Penfold's evidence was perhaps capable of offering some very slight corroboration of Evelyn's evidence, this court is completely satisfied that this caused no miscarriage of justice. The appeal against the conviction is accordingly dismissed.

As to the appeal against sentence, these were undoubtedly very grave crimes, but it is right to point out that these two girls in respect of whom the appellant was convicted of incest, together with their three sisters, had all been ravished by the appellant's father, who, prior to the commission of any of these offences, had for certain periods regularly had intercourse with all these girls. Moreover, as far as the appellant himself is concerned, it would appear that he himself had been corrupted sexually by his father. In all these circumstances, without in any way minimising the gravity of the offences, this court has come to the conclusion that a sentence of seven years' imprisonment is too long. After all, the father, who was a monster of depravity, received a sentence of 12 years' imprisonment, and his offences were very much graver than those committed by the appellant, serious though they were. In all the circumstances, this court concludes that the right sentence to have passed on the appellant would have been a sentence of four years' imprisonment on each count, to run concurrently; and the sentence of seven years will be reduced to four years. The appeal against sentence is allowed accordingly.

Order accordingly.

Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions.

T.R.F.B.

QUEEN'S BENCH DIVISION

(PARKER, C.J., EDMUND DAVIES, L.J., AND CAULFIELD, J.)

March 26, 1969

R. v. AUBREY-FLETCHER. *Ex parte* THOMPSON

Magistrates—Binding-over—Case not completed—Jurisdiction of magistrate—Necessity that it should have emerged that breach of the peace may occur—Justices of the Peace Act 1361 (34 Edw. 2 c. 1)—Magistrates' Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 91.

An order for binding over under s. 91 of the Magistrates' Courts Act, 1952, can be made by a magistrate only after the hearing of the case has been completed, but an order under the Justices of the Peace Act, 1361, can be made at any time during the proceedings, subject to an opportunity being given to the defendant or his advisers to argue against it. There is, however, no jurisdiction to make such an order unless the proceedings have reached a stage where it has emerged that there may be a breach of the peace in the future.

MOTION by George Thompson for an order of certiorari to bring up and quash an order made by J. AUBREY-FLETCHER, Esq., a metropolitan magistrate sitting at Marlborough Street Magistrates' Court on 4th March 1969.

Lord Gifford for the applicant.

The respondent did not appear.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the applicant, George Thompson, for an order of certiorari to bring up and quash an order made by the stipendiary magistrate sitting at Marlborough Street Magistrates' Court on 4th March 1969, whereby he ordered that the applicant be bound over to keep the peace for a period of three months in the sum of £500, and if the said order was not complied with, he be imprisoned for 90 days. It is quite clear that this was a bind-over made by the magistrate under the Justices of the Peace Act 1361.

The applicant was charged with two offences contrary to s. 54 of the Metropolitan Police Courts Act 1839 in respect of two occasions when it was alleged that he used insulting words whereby a breach of the peace may have been occasioned. The two charges were listed for hearing on 4th March, when it was decided that the two charges should be heard separately and the hearing on one charge was commenced at 3.45 p.m. During the rest of the day the evidence given consisted of the evidence of a police constable, who gave evidence that the applicant had been speaking at Speakers' Corner and had used various words whereby he said a breach of the peace may have been occasioned. He was cross-examined to the effect that those words were not used at all, and in any event that they were not likely to cause a breach of the peace. The case could not be completed that day, and at the adjournment the question of bail was raised. The prosecution suggested that bail might be granted subject to some condition that the applicant should not take part in meetings at Speakers' Corner. The applicant was represented by counsel, who sought to argue that any such condition would be invalid, and in an affidavit put in by the learned magistrate, he said that he was inclined to accept that view, and thereupon he proceeded to make the order binding over the applicant under the Act of 1361.

It is argued before this court that that order was invalid for a number of reasons. It is said in the first instance that there is no power to make such an order until the case involving the applicant has been finished; alternatively it is said that it cannot be exercised until the applicant has been examined and

cross-examined. For my part I am quite unable to accept either of those contentions. This is not a bind-over made under s. 91 of the Magistrates' Courts Act 1952, in which case there must be a complaint and that complaint must be adjudged to be true, in other words the case must be heard out completely. An order under the Act of 1361 can, however, be made at any time during the proceedings, subject of course to an opportunity being given to the applicant or his advisers to argue against it. That was the decision of this court in *Sheldon v. Bromfield Justices* (1). At the same time, as it seems to me there is no jurisdiction to make this order unless, in the course of the proceedings, it emerges that there might be a breach of the peace in the future. In the present case, as I understand it, that stage had not been reached. There may be cases, of course, when that fact emerges even before the defendant in the case gives evidence; to take the present case, if there were no cross-examination to the effect that the words used were spoken, but merely that they were not calculated to give rise to a breach of the peace, it seems to me the magistrate might then say:

"It is admitted that the words were used and having seen the nature of those words, it looks as if there would be proof that a breach of the peace had been committed here."

Then if it was anticipated that there might be a repetition, there would be power to make the order. So far, however, as this case is concerned it does not seem to me that that stage had been reached, and on that ground and on that ground only, I have come to the conclusion that this order ought to be set aside.

I would just like to add this, that it does appear that this order was made once the magistrate had decided that he ought to accede to the submission made on behalf of the applicant that any restriction on his movements to Speakers' Corner would not constitute a valid condition of bail, in other words it was said that this order was made, as it were, as an alternative, to the making of a condition of bail. Whether or not it could have been made a valid condition of bail I do not propose to decide, but if it could be made a valid condition of bail, then the applicant of course would have the right to appeal to the judge in chambers on it, and it might be said to be wrong to order a bind-over in lieu of such a condition. For my part, however, I find it unnecessary to decide that point.

EDMUND DAVIES, L.J.: I agree. A distinction has to be drawn between the power of the court in relation to a bind-over under s. 91 of the Magistrates' Courts Act 1952, and the similar power exercised by virtue of the Justices of the Peace Act 1361. In the former case there must be proof; in the latter case there need not be proof of the matters complained of, but nevertheless the order cannot be made capriciously. In relation to the Act of 1361, the test which LORD PARKER, C.J., has already enunciated is, with respect, the correct one. There must emerge during the course of the hearing, which need not be a completed hearing, material from which it may fairly be deduced that there is at least a risk of a breach of peace in the future. That approach is in line with the decision of the Divisional Court in *Wilson v. Skeock* (2). There the information was wrongly laid under the Public Order Act 1936, but nevertheless the defendant was bound over to keep the peace under the Justices of the Peace Act 1361. In the course of holding that the magistrates were entitled so to act, LORD GODDARD, C.J., had this to say:

(1) [1964] 2 All E.R. 131; [1964] 2 Q.B. 573.

(2) (1949), 113 J.P. 294.

"It is for that reason—because they were satisfied that there might be a breach of the peace between these two persons—that they have bound the defendant to keep the peace 'towards his Majesty and all his liege people and especially towards the complainant for the term of two years'."

In the present case it is significant that not only was the trial even on the first charge only partially heard—that of itself, as we have already indicated, does not conclude the matter either way—but there had been a direct challenge of the essential evidence of the one witness, a police constable, as to what had transpired during the first incident complained of. Furthermore, and most noteworthy of all, when one turns to the affidavit of the learned magistrate one finds there no indication that he had formed even a tentative view that the evidence so far adduced in this uncompleted hearing of the first charge was such as to cause him to think that there might be a breach of the peace in the future. Accordingly, in my judgment, he was not entitled at that stage to bind over the applicant.

I agree with LORD PARKER, C.J., also that, from what transpired in this case, it looks very much as though there was certainly under consideration by the learned magistrate at one stage the granting of bail subject to a condition that the applicant did not take part in meetings at Speakers' Corner until the hearing was resumed. Whether or not the imposition of such a condition would be lawful, I do not think it was right to resort to the binding-over as an alternative to deciding that question one way or the other. For those reasons I agree in holding that this application should be allowed.

CAULFIELD, J.: I agree on the simple and limited ground that the stage had not been reached when resort could have been made to the powers given to magistrates under the Justices of Peace Act 1361.

Order for certiorari.

Solicitors: *James Goudie.*

T.R.F.B.

COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, M.R., WINN AND FENTON ATKINSON, L.JJ.)

March 31, 1969

HEWITT v. LEICESTER CITY COUNCIL

Compulsory Purchase—Notice to treat—Service—Service "deemed to be effected"—Service on owner by post—Returned "gone away"—Interpretation Act, 1889, s. 26.

Following on the making of a compulsory purchase order in respect of a house and yard, the local compensating authority, in May, 1965, sent to the owner of the property at an address at which she had resided a notice to treat by the recorded delivery postal service. The notice came back marked "returned undelivered" with a note that the addressee had "gone away". In December, 1965, the authority sent the notice to treat to the owner's agents.

HELD: although the letter of May, 1965, containing the notice had been properly addressed, prepaid and posted within s. 26 of the Interpretation Act, 1889, in view of the fact that from the evidence it appeared that the notice had never reached the owner of the property the court could not deem it to have been then served; the notice, therefore, was not validly served until December, 1965.

CASE STATED by the Lands Tribunal.

The city of Leicester, the compensating authority, appealed to the Court of Appeal against a decision of the Lands Tribunal holding that a notice to treat in respect of the compulsory acquisition of the house and yard of the claimant, Mrs. Olive Linda Hewitt, at 89, Upper Kent Street, Leicester, was served on the claimant on 23rd December, 1965, and not on 20th May, 1965, as submitted by the compensating authority. The contentions of the compensating authority on the appeal were as follows: (i) that under and by virtue of the provisions of s. 19 of the Lands Clauses Consolidation Act 1845, s. 26 of the Interpretation Act 1889, s. 169 (1) (c) and para. 8 (8) of Part 2 of Sch. 3 to the Housing Act 1957, and s. 1 (1) of the Recorded Delivery Service Act 1962, the notice to treat sent to the claimant by the compensating authority by recorded delivery service in a prepaid letter addressed to her at 23, Wharf Street, Leicester on 20th May 1965 was to be deemed to have been duly served on her, and that compensation payable to her by the compensating authority was the sum of £1,100 together with surveyors' fees of £38 12s., being the amount of compensation agreed to be payable if it fell to be assessed as at May 1965. (ii) that by reason of the statutory provisions the decision of the Lands Tribunal that the notice to treat was not effectively served until 23rd December 1965, and that accordingly the compensation payable to the claimant by the compensating authority was the sum of £1,500 together with surveyor's fees of £43 1s., being the amount of compensation agreed to be payable if it fell to be assessed as at December 1965, was wrong in law.

A. P. McNabb for the claimant.

P. G. Clough for the compensating authority.

LORD DENNING, M.R.: The compensating authority, Leicester City Council decided compulsorily to acquire a house, 89, Upper Kent Street, Leicester. They made a compulsory purchase order under Part 3 of the Housing Act 1957 which incorporated the provisions of the Lands Clauses Consolidation Act 1845, about a notice to treat. The owner of the house was the claimant, a Mrs. Olive Linda Hewitt. The compensating authority had an address for her—23, Wharf Street, Leicester. On 20th May 1965 they sent her a notice to treat and other formal documents in a letter by the recorded delivery service addressed to "Mrs. Olive Linda Hewitt, 23 Wharf Street". The letter soon came back through the post marked "returned undelivered", with a note that she had "gone away". Thereafter the house at 89, Upper Kent Street, became unoccupied so that it could be had with vacant possession. It turned out afterwards that the claimant was living at Leamington Spa. She appointed agents to act for her. On 23rd December 1965 the compensating authority sent the notice to treat and the other documents to the claimant's agents. The notice reached her agents on 23rd December 1965.

The question is: When was the notice to treat served? This is important because the value of the property is normally to be ascertained as at the date of the service of the notice to treat. The dates have made a great difference. If the notice to treat was properly served on 20th May 1965, the value of the house then was £1,100, but if it was not effectively served until 23rd December 1965, the value at that date was £1,500. So the question is whether the notice to treat of 20th May was a proper service.

The service of the notice to treat is covered by s. 169 (1) of the Housing Act 1957, which provides that it may be served—

“(c) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode.”

The time of service is governed by s. 26 of the Interpretation Act 1889, which provides:

“26. Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression ‘serve’, or the expression ‘give’ or ‘send’, or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

It was submitted on behalf of the compensating authority that it was sufficient for them to post the letter, even though it was returned “gone away”; and they relied on the recent case of *Moody v. Godstone Rural District Council* (1). But I regard that as a very special case. The letter there was not returned through the post. It presumably reached the defendant. It was only when he got to court that he said he never received it. No wonder his excuse did not prevail! I prefer to go by the earlier decision of this court in *R. v. Appeal Committee of County of London Quarter Sessions, Ex p. Rossi* (2). There a bastardy summons was returned to the sender marked “undelivered” “no response”. It was held that it had not been served.

This is a case like *Rossi's* case where the time of service was important. The valuation depended on it. Once it appeared that the letter of 20th May 1965 was returned through the post marked “gone away”, then it was quite plain that it was not served at all. We are not bound to “deem” a notice to be served at a particular time, when we know that in fact it was not served at all. The notice to treat was not served on 20th May 1965. It was not served until 23rd December 1965. The valuation should be £1,500 and not £1,100. I agree with the reasons given by the Lands Tribunal in this case for the decision and I would dismiss the appeal.

WINN, L.J.: I agree.

FENTON ATKINSON, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Nabarro, Nathanson & Co.*, for *Barradale & Haxby*, Leicester;
Field, Roscoe & Co., for *R. R. Thornton*, Leicester.

G.F.L.B.

(1) 130 J.P. 332; [1966] 2 All E.R. 696.

(2) 120 J.P. 239; [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., EDMUND DAVIES, L.J., AND CAULFIELD, J.)

April 1, 1969

R. v. SECRETARY OF STATE FOR HOME AFFAIRS. *Ex parte* HARNAIK SINGH

Commonwealth Immigrant—Request for admission for specified period—Immigration officer not satisfied applicant entitled to admission for that period—Discretion of immigration officer—No obligation to consider whether applicant entitled to admission for shorter period—Commonwealth Immigrants Act 1962 (10 & 11 Eliz. 2 c. 21), s. 2 (1), as substituted by Commonwealth Immigrants Act, 1968 (c. 9), s. 2 (1).

Where an immigration officer, acting under the Commonwealth Immigrants Act 1962, s. 2 (1) (as substituted by the Commonwealth Immigrants Act, 1968), has come to the conclusion that a Commonwealth applicant for admission to the United Kingdom for a specified period is not entitled to be admitted for that period, there is no obligation on the officer, on his own initiative, to consider whether the applicant is entitled to admission for a shorter period.

MOTION by Harnaik Singh for an order of certiorari to bring up and quash a decision of an immigration officer, Sidney Anthony Rowe, at Birmingham Airport on 6th March 1969, which was confirmed on behalf of the Secretary of State for Home Affairs on 12th March 1969, that the applicant, a Commonwealth citizen to whom s. 1 of the Commonwealth Immigrants Act 1962 applied, should not be admitted to the United Kingdom. The applicant also applied for an order of mandamus ordering both the immigration officer and the Home Secretary to reconsider the matter according to law.

D. C. Pitman for the applicant.

Gordon Slynn for the respondent, the Secretary of State for Home Affairs.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the applicant, one Harnaik Singh, for an order of certiorari to quash the refusal to admit the applicant to the United Kingdom on 6th March 1969 and also an order of mandamus directed to the immigration officer and the Secretary of State for Home Affairs to reconsider the matter according to law.

What happened was that on 6th March at Birmingham, the applicant landed. He is a Commonwealth citizen from India and he claimed to be on a visit for three months to his brother-in-law, one Mohan Singh. He produced to the immigration officer a sponsorship form which had been sent to him by Mohan Singh, saying that he, Mohan Singh, would be responsible for him in this country during the three months' stay. Enquiries were made of the applicant, and, in view of the sponsorship form, of Mohan Singh, who had come to the airport to meet him. The applicant clearly made the immigration officer somewhat suspicious in that he doubted the applicant's veracity concerning the fact that the applicant said he was a wealthy man engaged with his family in farming in India, while he had never been to school, and had never travelled. As far as Mohan Singh was concerned, the immigration officer was supplied with a deposit account book from Barclays Bank which showed that at the date when the applicant landed on 6th March, there was a balance to the credit of that account of some £200. It is quite obvious, though, from looking at the account, that the balance from time to time was highly erratic. In 1967 it was some £249, but from then on throughout 1968 and indeed down to the time when the sponsorship

declaration was made, the balance was under £10. Then, as Mohan Singh frankly admitted, for the purposes of the declaration of sponsorship he paid in some £271 to give a balance of £280. The moment the sponsorship form had been sent off, the balance was reduced once more to £10 and then was brought up to £200 at the time of the applicant's arrival. Still more suspicious was the fact that Mohan Singh, who had been here since 1963, had a wife and family in India, and it seemed very odd, to say the least, that Mohan Singh was prepared to support his brother-in-law whom he had never seen, and thereby delay any chance of getting his wife and family over here until he had saved more money.

Both the immigration officer, and on petition the immigration department of the Home Office, have stated throughout that they are not satisfied that the applicant did not intend to work, and are not satisfied that Mohan Singh intended to or would support the applicant during his stay. In the course of the enquiries into this matter, the applicant reduced his application to one for six weeks as opposed to three months, and that also was considered and refused.

The only point which counsel for the applicant takes here is this. He says that the immigration officer at the airport and the immigration department of the Home Office have failed to ask themselves the right question; the right question, according to counsel, would have been: for what period are we satisfied that sufficient money was available and would be used by Mohan Singh? In other words they should have said to themselves: I wonder whether it would not be safe to allow the applicant in for, say, two weeks, making that a condition for his entry, and that Mohan Singh could be trusted to support him for that period.

For my part I cannot accept that it is any part of the duty of an immigration officer, acting fairly in the matter, to go into matters which have never been advanced by an applicant at all. If the applicant asked for six weeks, the immigration officer must consider it on that basis; if he asks for a fortnight, he must consider it on that basis. It is no part of an immigration officer's duty to consider every possible period.

Quite apart from that, however, as counsel for the respondent has pointed out, really the applicant falls at the first hurdle, because he has not satisfied the immigration officer that he is not going to work during such period as he is allowed entry into the country. In those circumstances, it would be unnecessary to go on and consider whether, if he was not going to work, there was somebody to support him. In my judgment these applications fail and should be dismissed.

EDMUND DAVIES, L.J.: I agree. In *Re K. (H.) (an infant)* (1) dealing with the nature of the duty imposed on immigration officers by the Commonwealth Immigrants Acts 1962 and 1968, **LORD PARKER, C.J.**, said:

"Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but of acting fairly . . ."

Seizing on those words, counsel for the applicant has said there has in the present case been a failure by the immigration officers concerned to bring their minds to bear on the problem, on the grounds that they should have offered the applicant a shorter period of stay in this country than the one sought by him, originally three months, but later reduced to six weeks. He submits that, at the very least, they should have considered the propriety of admitting him for a shorter period than either of those sought, and should then have proceeded to offer admission for such shorter period as they considered proper. With **LORD PARKER**,

(1) [1967] 1 All E.R. 226; [1967] 2 Q.B. 617.

C.J., I think that that approach is absolutely unwarranted. The only problem which confronted the immigration officer was (in its finality) whether the applicant should be admitted here for six weeks. I read nothing into the existing legislation, the instructions to the immigration officers (whether they be legally binding or otherwise), or in the reported decisions of this court which persuade me to the view that there is any kind of duty, legal or moral, on the immigration officer to say to an applicant: "You cannot come here for the period of time you seek, but you may come here and stay here for a shorter period, namely for, as the case may be, so many weeks or months." Furthermore, to describe the omission by an immigration officer to make, as it were, a counter-offer of that kind as a breach of natural justice is what I must be permitted to describe as an abuse of language. There is nothing in the decision in *R. v. Lympne Airport Chief Immigration Officer, Ex p. Amrik Singh* (1) to indicate that the duty of an immigration officer is of the kind that counsel for the applicant has here submitted. On the contrary, LORD PARKER, C.J., if I may say so, there took particular care to leave quite open, to be decided on the facts of any future case, whether or not the applicant has failed in limine to satisfy the immigration officer that he does not intend to, or is not likely to, seek employment during the period of his stay. For those reasons I, too, think the applications should be refused.

CAULFIELD, J.: I agree. It would seem to me that the immigration officer in this case applied his mind to the proper questions that he had to answer under the Commonwealth Immigrants Act 1962, and having carried out a close investigation on both the applicant and his brother-in-law in my judgment came to a proper conclusion. I agree that the applications should be refused.

Applications dismissed.

Solicitors: *D. P. Debidin; Treasury Solicitor.*

T.R.F.B.

(1) *Ex p. Amrik Singh*, [1968] 3 All E.R. 163; [1969] 1 Q.B. 333.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON, L.J., MELFORD STEVENSON AND CUSACK, JJ.)

March 3 and April 1, 1969

R. v. DELMAYNE

Criminal Law—Protection of depositors—Invitation to deposit money—Mutual benefit society—Advertisements for deposits—Variety of benefits offered—Loan repayable at a premium—Meaning of “premium”—Advertisement sent to member of society—Issue to public—Protection of Depositors Act 1963, s. 2 (1), s. 26 (1).

The appellant was convicted on two counts charging him with inviting the public to deposit money with him, contrary to s. 2 (1) of the Protection of Depositors Act, 1963. Section 26 (1) of the Act defined “deposit” as “a loan of money repayable at a premium”.

In 1964 the appellant became general secretary of a mutual benefit society. He was a member of the society, but in fact ran it and was its alter ego. In 1966 L. applied to join the society. His application was accepted by the appellant, who enclosed with the letter of admission a printed circular signed by him. This was addressed to the public at large and referred to the benefits of membership of the society and of paying in money into it. In addition to their right to withdraw their money at any time, prospective depositors were promised a substantial dividend, £500 accidental death life cover, the chance of doubling the deposit, and borrowing facilities. L. made an initial deposit of £3 on becoming a member and afterwards deposited substantial sums. A further circular signed by the appellant invited deposits and offered benefits in the form of personal loans, purchase of a house or flat without a deposit, and £500 accidental life cover.

HELD: (i) that the word “premium” in s. 26 (1) was not confined to the payment of an ascertained capital sum on the repayment of a loan made to the society, and the advantages to the depositors held out in the circulars were “premiums” within the meaning of that subsection; (ii) as on becoming a member of the society, L. did not cease to be a member of the public, the circular sent to him on his admission to the society was issued to the public within the meaning of s. 2 (1) of the Act; the conviction of the appellant on both counts was, therefore, correct.

APPEAL against conviction by Anthony Delmayne who was convicted at the Inner London Sessions on an indictment charging him with inviting deposits of money contrary to s. 2 (1) of the Protection of Depositors Act 1963.

J. F. F. Platts-Mills, Q.C., and S. J. F. Walsh for the appellant.

R. D. L. Du Cann for the Crown.

SALMON, L.J., delivered the judgment of the court in which he referred to the counts on which the appellant was convicted and continued:

It is convenient in considering this appeal to take counts 1 and 3 together and deal with them first, and then go on to deal with counts 4 and 5. I ought to read s. 2 (1) of the Protection of Depositors Act 1963, which is in these terms:

“(1) Subject to the following provisions of this section, no person shall, after the commencement of this Act, issue any advertisement inviting the public to deposit money with him.”

It is necessary then to look at s. 26 in order to see the definition of “deposit” and of “advertisement”. Section 26, so far as it is relevant, is in these terms:

“(1) In this Act ‘deposit’ means a loan of money at interest, or repayable at a premium . . . [then there are certain exceptions which again are immaterial] (3) In this Act ‘advertisement’ includes every form of advertising, whether in a publication or by the display of notices or by means of circulars

or other documents . . . (4) For the purposes of this Act an advertisement which contains information calculated to lead directly or indirectly to the deposit of money by the public shall be treated as an advertisement inviting the public to deposit money."

The first question that arises is: Did the appellant issue an advertisement inviting the public to deposit money with him? The points taken by counsel for the appellant on this part of the case are: that the documents are not advertisements; that they were not issued to the public; that they did not invite a deposit within the meaning of that word in the Act; that they were not issued by the appellant; and that they did not invite a deposit with him.

It is perhaps at this stage appropriate to look at some of the documents. I am certainly not going to read them all. One purports to emanate from the appellant. It is headed the "SOUTH WESTERN DEPOSIT & LOAN SOCIETY (Established 1889) (The Mutual Benefit Society)". Then it goes on:

"DO YOU Want a House? Or a Personal Loan? Or Double your Money? Or other Benefits? *In your Lifetime and NOW? How does it work? AND IT HAS WORKED SINCE 1889.* . . . Over £2,200,000 has been handled for the benefit of members and over £1,000,000 has been paid out in personal loans and dividends etc. While the average dividends have been 14 3/5% per annum since 1889. We all put money in a fund from which we can have personal loans, in excess to our savings . . . *YOU CAN WITHDRAW ANY TIME* and take out your money without fuss and bother. [Then there is a heading] *UNIQUE SETTLEMENT SCHEMES.* 'The Creation of a substantial Estate (in this case a substantial cash sum) for you or others in your Lifetime'."

Then under the heading of "*ATTRACTIVE & UNUSUAL FEATURES* and how does it work?" this appears:

"*This means that you may have personal loans anytime, while you are still paying towards the settlement, of as much or more than your total contributions up to that date.*"

If one turns over the document (which is not perhaps a miracle of felicitous draftsmanship) there are:

"*MORE DETAILS . . . PERSONAL SETTLEMENT:* A gift to yourself.

Example: If young and you paid over a period of years a total of £2,340, you get back £14,139 Tax free, or a Pension of at least £933 per year and the capital of £14,139 is always there available for you."

In the view of this court, this printed document is obviously a circular, and it certainly invites any persons to whom it is addressed to deposit (in the ordinary sense of the word) money with the society. The point that there was no evidence that it could constitute an advertisement or invitation is quite hopeless.

Counsel for the appellant draws attention to the fact that this was a circular which was sent to Mr. Lake on his admission to the society and not before. According to the evidence, Mr. Lake applied on 5th March to join the South Western Deposit Society. I need not read the form which he signed; it indicated that he was proposing to put up between £1 and £5 a week, and acknowledged that:

"*DECLARATION* Once I am accepted by the society, I understand that I am fully entitled to all benefits, rights, and duties as a member according to the rules, Bye-laws and Resolutions of the society."

There can be no doubt that he was promptly accepted as a member, because two days later there is a letter purporting to be signed by the appellant from the South Western Deposit and Loan Society, saying:

"Dear Mr./Mrs. Lake, We are pleased to inform you that the committee have considered your application for membership and have pleasure in welcoming you as a member into this society"

and he celebrated his election by paying a deposit of £3. It is that letter of 7th March which apparently enclosed the document to which reference has already been made.

The point that counsel for the appellant has taken is that after Mr. Lake joined the society he ceased to be a member of the public, and that this document was a confidential communication addressed to Mr. Lake as a member of the society, and not a circular sent to him as a member of the public. Quite obviously, the document by its very terms does not purport to be confined to members of the society; indeed, it is obviously soliciting custom from the public. It is addressed to the public at large pointing out the benefits of membership of the society; not only the benefits of membership but also the benefits of paying money into the society and continuing to pay in as much as possible.

This court cannot accept that once Mr. Lake joined the society he ceased to be a member of the public, nor that when he received this document he received it purely in his capacity as a member of the society and not as a member of the public. In our view, he obviously received it as a member of the public. It was clearly inviting him to deposit money with the society, and we know that he continued to deposit money with the society to the tune of many hundreds of pounds after the initial deposit of £3.

The next point that counsel for the appellant takes is that Mr. Lake may have put up several hundreds of pounds, but he was not depositing the money. In other words, the circular to which I have referred was not an invitation to him to deposit money, within the meaning of that word in s. 26 of the Protection of Depositors Act 1963: first, because it was not an invitation to deposit the money as a loan; and secondly, because it was not an invitation to deposit the money as a loan repayable at a premium.

Unless we had heard the first point argued by counsel we would have been tempted to say it was unarguable. If this was not a loan, what was it? "*YOU CAN WITHDRAW ANY TIME* and take out your money without fuss and bother". Those are the words of the relevant document.

Then it is said that the invitation says nothing about the loan being repayable at a premium. We have to construe the word "premium" as it appears in s. 26 of the Act of 1963. It has a wide and imprecise meaning. This court cannot derive any assistance from other cases in which the word has been construed in the sense in which it appears in other Acts. In considering the sense in which it is used in the Act of 1963 it is perhaps helpful to look at the short title to the Act which is: "An Act to penalise fraudulent inducements to invest on deposit . . .". Ought we to give the word "premium" the very narrow meaning for which counsel for the appellant contends, namely, ought we to confine it to the payment of some ascertained capital sum on the repayment of the loan; or ought we to give it a more liberal and wider meaning? This court has no doubt particularly having regard to the manifest purpose of the Act, that the word "premium" truly has a much wider meaning than that contended for on behalf of the appellant. Any advertisement that invites the deposit of money as a loan on the basis that if one deposits £x one will in fact receive

in return not £x but £x + y, is an invitation within the meaning of this Act to make a deposit or a loan repayable at a premium.

The document from which I have already read makes it quite plain that the prospective depositor is being promised a great deal in addition to his right to withdraw the money at any time; he is told that the average dividend since 1889 has been 14 3/5ths per cent. per annum; he is being told that if he makes a deposit, £500 accidental death life cover is given automatically by becoming a member in benefit; and he is also being told that there is a good chance of doubling his money. One way of multiplying his money by more than five times is illustrated in the personal settlement scheme, for which it would be eligible if he became a member by making a deposit.

It is obvious, in the view of this court, that all these advantages which are held out to the prospective customer, in addition to the advantage that he will be able to borrow more money than he has put up—which in itself must have some value—can properly be described as premiums within the meaning of that word as used in s. 26 of the Act.

Then it is said that even if all that be true, it has to be shown that the advertisement was issued by the appellant inviting deposits to be made to him. Counsel for the appellant argues that he, the appellant, was nothing but the secretary of this society, and that according to the rules, which were drafted towards the end of the last century and have been in existence ever since, the secretary occupies a comparatively subsidiary position in this society and his duties are purely administrative.

No doubt in 1889 that was true, and still may be, if one is guided only by the rules. But time moves on, and it was in 1964 that the appellant became secretary. When the appellant was questioned by the police, he said:

“I took the society over about three years ago and became secretary.

I felt I wanted to make something bigger, so I started the mutual benefit society. I decided to have a barrister look into it for me.”

In the view of this court, there was ample evidence on which a jury could come to the conclusion from what the appellant had said to the police that he was, in fact, running this society; and, indeed, that, although the society was no doubt a reality, he was its alter ego. The jury could also well have come to the conclusion from the evidence before them that the appellant was a member of the society. If one looks at the rules, they strongly suggest that the officers of the society are recruited from amongst the members of more than three months' standing, and the secretary is undoubtedly an officer of the society.

It is quite plain from what he told the police that as he was running the society he was responsible for issuing the document which I have mentioned. It is inconceivable that the man who had been running the society for more than two years, and whose name appears on the document as its general secretary, would not have known and approved of this circular.

As to whether the invitation which it contained was an invitation to lend money to him, it seems to this court that the case can be put in either one of two ways. There was the evidence to which I have referred, from which the jury could have inferred that he was the alter ego of the society, and, therefore, that this was an invitation to lend money to him. If one looks at the rules, the jury had plenty of evidence that he must have been a member of the society, and, therefore, if he was inviting loans to be made to the society, inasmuch as he was a member of it he was inviting the loans to be made to him. In the view of this court, therefore, all the points taken in relation to count 1 fail.

Very much the same applies to count 3. It is based on a circular or advertisement which the police found in the window of the society's premises. The last document to which I have referred is not very precise, and this is an even more imprecise document; but its general tenor is quite clearly "come and join the society, the benefits are overwhelming". I must read one or two passages from the document, which was again signed (or purported to be signed) by the appellant.

"*HOW LONG DOES IT TAKE TO GET A HOME?* It varies, but normally between one month to one year. *And all the above benefits we would NEVER get if we are by ourselves, we can only get it if we join together. You must admit this is worthwhile, and we are certain you will join us and get others to join us too.* . . . Please note that all this is a non-profit making scheme, and nobody makes a profit out of your money except yourself as you can see by the shareouts—dividends paid out to members over a period of 76 years since the society has been in existence. Do not confuse these savings with the Deposit on the future House—a Deposit is sunk into the price of the house. This is not so with this Society, these savings once you purchase the property are left in the Society as savings, not as a deposit on the house, it is only used to allocate points to you because the whole scheme is based on as much savings as possible by members, so as to buy houses for members, but the money you save is still yours and you earn a dividend on it."

I now turn to another page where "*BENEFITS*" appears.

"I understand that I am entitled automatically to all the following benefits while a full Member and in benefit. Personal Loans **** To purchase or rent a Flat or House without Deposit **** £500 Accidental Death Life Cover . . . The above benefits may be discontinued or added to by the decision of the Members of the Society."

It seems to this court no less plain under count 3, which depends on this document, than it was plain under count 1 that there is an invitation to the public to make loans to the society which are repayable at a premium. It seems that there is a clear invitation here on the basis that "If you put up the money, not only will you get it back when you like, but you will get very substantial benefits in addition which will be of money's worth". This court can see no reason why those additional benefits to which the invitation refers are not premiums within the meaning of the Act.

The points as to whether the invitation under count 3 was issued by the appellant and is an invitation to make a loan to him are exactly the same as those which arise under count 1. The court has already indicated its view on these points. It follows, therefore, that the appeal so far as counts 1 and 3 are concerned is dismissed. [HIS LORDSHIP then considered counts 4 and 5 and concluded that the appeal against conviction in respect of these counts must be dismissed.]

Appeal against conviction dismissed.

Solicitors: Registrar of Criminal Appeals; Director of Public Prosecutions.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., BLAIN AND DONALDSON, JJ.)

February 24, 25 and March 27, 1969

R. v. SENATE OF THE UNIVERSITY OF ASTON. *Ex parte* ROFFEY AND ANOTHER*Education—University—Failure to pass examination—Students required to withdraw—Natural justice—Right of student to be heard before decision.*

The applicants R. and P. were students at a university and were reading for the degree of B.Sc. with honours. At the end of the first year of their course in June 1967 both passed examinations in the three major subjects of their course, but P. failed in one and R. in both of the subsidiary subjects. They were allowed to sit in September 1967 for "referred examinations" in these subjects, but both failed badly. The Senate, which was the supreme academic authority and as such empowered to make regulations for the education and discipline of students, had provided by reg. 4 that "students who fail in . . . a referred examination may at the discretion of the examiners re-sit the whole examination or may be required to withdraw from the course". After the applicants' failure in the referred examinations, the examiners met and considered not only the applicants' academic achievements, but also a number of personal factors, and resolved that they be asked to withdraw from the course. The applicants were informed of this decision by letter dated 20th September, 1967, but prior to this had not been given any chance to make representations to the examiners. After the examiners' decision had been reviewed by a number of other bodies, it was confirmed by the Senate in November 1967 and by the University Council in December 1967. In July 1968 the applicants applied for orders for mandamus to re-admit them to the university and for certiorari to quash the decision of the Senate, confirmed by the Council. No reason was given for the delay and as R. was no longer interested in returning to the university, his case was not pressed.

HELD, per DONALDSON and BLAIN, JJ.: on a construction of the regulations, the decision whether a student who had failed in a referred examination should re-sit the whole examination or be required to withdraw from the course was in the discretion of the examiners alone; that, in exercising this discretion, the examiners were obliged to observe the rules of natural justice; but that the rule *audi alteram partem* does not apply in every case where the rules of natural justice are applicable.

Per the WHOLE COURT: since the examiners had not confined themselves to a consideration of the applicants' academic achievements, but were prepared to take into consideration the personal problems and difficulties of each student, natural justice required that the student should be given an opportunity of being heard, orally or in writing; this had not been done, and the rules of natural justice had not been observed; but, as the granting of the prerogative remedies was discretionary, in view of P.'s delay in approaching the court, his application must be refused.

MOTIONS by Derek Anthony Roffey and Michael Bruce Pantridge for orders of mandamus directed to the respondents to re-admit the applicants to the University of Aston, and, alternatively, for orders of certiorari to bring up and quash a decision made by the senate of the university on 1st November 1967, and confirmed by the council of the university on 8th December 1967, that the applicants were not to continue reading for the degree of B.Sc.

J. A. Moncaster for the applicants.

Hugh Forbes, Q.C., and Michael Mann for the senate.

Cur. adv. vult.

27th March. DONALDSON, J., read the following judgment: Derek Anthony Roffey and Michael Bruce Pantridge were student members of the University of Aston, in Birmingham, reading for the degree of B.Sc. with honours in Behavioural Science. In June 1967, at the end of the first year of the course, both passed the examinations in the three major subjects, consisting respectively of the Elements of Psychology, Elements of Sociology and Elements of Economics.

In addition the applicant Pantridge passed in the subsidiary subject of Statistics. Unfortunately he failed to achieve a pass mark in the other subsidiary subject of Social and Economic History. The applicant Roffey failed to pass in either subsidiary subject. In September 1967 both the applicants, together with other students who had experienced similar failures, were re-examined in the subjects in which they had been unsuccessful, but again they failed to achieve pass marks. Thereafter, on or about 20th September 1967 the applicants received letters from their course tutor asking them to withdraw from the Behavioural Science course and, by implication, from student membership of the university. Following protests by the applicants, Mr. Michael Griffin (the president of the guild of students of the university) and the applicant Pantridge's father, this decision was reviewed by the board of examiners, the board of Faculty of Social Science, and the senate and the council of the university and in the end was affirmed.

The applicants now apply to this court for orders of certiorari to bring up and quash the relevant decision that they be asked to withdraw from the course, and of mandamus requiring the university, by the appropriate body, to determine in accordance with law whether they should be allowed to re-sit the whole of the examinations which they took in June 1967 or whether they should be asked to withdraw from the course. The grounds of these applications are broadly that those responsible for the decision to refuse to allow them to continue with their studies and those who reviewed and affirmed the initial decision failed to observe the requirements of natural justice in that they failed to afford the applicants any, or any adequate, opportunity of being heard. Before expressing any view on the merits of these applications it is necessary to advert to the constitution and organisation of the university and to examine the history of the matter in greater detail.

The University of Aston in Birmingham was incorporated by royal charter in April 1966 in direct succession to the college of advanced technology in that city. The charter reserves a power of appointment of a visitor, but no such appointment has yet been made. The council of the university is the executive governing body concerned with management and administration. The supreme academic authority in the university is the senate, which is charged with responsibility for its teaching and research work and for the regulation and superintendence of the education and discipline of the students. The charter, in addition to providing for the constitution and powers of the council and senate, also provides for the creation of a board of each faculty and for a guild of students, the latter having representatives on the convocation of the university and for an academic advisory committee to advise the council and senate on academic matters. Finally, so far as is material for present purposes, the charter declared the university to be both a teaching and examining body with power:

"[3 (a)] To prescribe in its Ordinances or Regulations the requirements for Matriculation and the conditions under which persons may be admitted to the University or to any particular course of study . . . (c) to confer . . . under conditions laid down in its Statutes or Ordinances, Degrees . . . on . . . persons who shall have pursued a course of study approved by the University and shall have passed the examinations or other tests prescribed by the University."

Section xxi of the statutes of the university provides that the powers of each faculty board shall include:

"[4] . . . the right to discuss any matters relating to the work of the

Faculty and any matter referred to it by any other body within the University and to convey its views and to make recommendations thereon."

Section xix of the statutes confers general disciplinary powers on the senate including the right—

"[22]...to suspend any student from any class or classes, to exclude any student from any part of the University or its precincts, to expel any student from the University, or to take such other action as the Senate thinks proper..."

but these powers are expressly made subject to s. xxviii which provides students with a right of appeal to the senate or to a senate committee against any proposal by the senate to suspend, exclude or expel and entitles the student concerned to be heard in person.

General regulations for the degree of B.Sc. were approved at a meeting of the senate in July 1966, that is to say before the applicants became students for the relevant course. These provided that:

"[6] Candidates who fail to satisfy the examiners in examinations other than final examinations may as the examiners determine either (a) be referred in such subject or subjects in accordance with the appropriate Course Regulations, or (b) resit, on one subsequent occasion only, in the following Academic year, the whole examination with or without further attendance, or (c) be required to withdraw from the Course."

A referred examination is a special additional examination held in September just before the beginning of the academic year, for those who failed to pass in the particular subject in the regular examinations held in or about June at the end of the previous academic year. A re-sit is not a special examination, but a re-taking in June of all the examinations taken by the student concerned in the previous June, without exemption based on the fact that he may then have passed some of those examinations.

Behavioural Science appears to be concerned with the application of sociology, psychology and economics to the work of management in commerce and industry. Courses in this subject were provided by the college of advanced technology in 1964, 1965 and 1966 and were continued by the new university in 1967. The prospectus for the year 1966-67 was printed in the spring of 1965 because the system of centralised applications for admissions to universities required such documents to be distributed to all schools not later than 14 months before the beginning of the academic year. This showed Introductory Statistics as an examinable subject, but Social and Economic History as non-examinable. The Student's Handbook for 1966-67, which may or may not have been published equally far in advance, gave similar information. Both became inaccurate in the event, since in July 1965 the steering committee for the course of Behavioural Science resolved or recommended that Social and Economic History should become an examinable subject and this took effect in the 1965-66 and subsequent academic years. I have mentioned this matter because it was relied on by the applicants when seeking leave to issue the present proceedings. However it is conceded by counsel for the applicants that they were fully informed of this change when they began their studies.

This change was also reflected, albeit belatedly, in special regulations governing this course of studies which were approved by the senate on 15th March 1967. The delay in securing this approval was apparently attributable to consideration of other matters which are not here material. These special regulations also provided under the general heading of "Examinations and Course Structure" that:

"4... (e) Any student who fails to achieve a pass standard in Statistics and/or Social and Economic History may on the recommendation of the examiners be permitted to take referred examinations in these subjects, and may, if successful, be permitted to proceed on the Honours Course. (f) Students who fail in more than one major subject, or who fail in a referred examination, may at the discretion of the examiners, resit the whole examination or may be required to withdraw from the course. Students who are successful in such resit examinations shall normally be eligible to proceed to the Pass Degree only."

The applicant Roffey entered the university as a student in October 1966 and read Behavioural Science from the outset. The applicant Pantridge entered the college of advanced technology in October 1965 and became a student member of the university on its incorporation in April 1966. He initially read Metallurgy, but transferred to the first year of the Behavioural Science course in January 1967. Both were examined in June 1967, mock or practice examinations having been held in February. On the basis of the results a large number of students, including the applicants, were permitted to take referred examinations in September. Ten out of 21 candidates failed the referred examination in Social and Economic History and eight out of 12 failed that in Introductory Statistics. These rates of failure in referred examinations were without precedent, but counsel for the applicants has very fairly and frankly disclaimed any intention of attacking the marking of the papers.

The results caused grave disquiet amongst the academic staff as well as the students, and consultations were held between the examiners in the two subsidiary subjects and two of the course tutors, one of whom was the chairman of the examining boards for the course. Each individual's results were considered in the light of information available on record cards or known to those present. This was not confined to academic matters, but included the fact that one student was labouring under acute personal and family difficulties, that another had an impediment of speech which created personal problems and yet another had crushed two vertebrae in a riding accident and had barely recovered in time for the referred examination. In the end it was decided that six students, including the applicants, be asked to withdraw from the course, and that five students be asked to repeat the first year of the course. These decisions were communicated to the students by the letters dated 20th September 1967 to which I have already referred.

On 25th September 1967 both the applicants had interviews with Mr. Podmore who was their tutor. The applicants' accounts of what occurred and Mr. Podmore's account are irreconcilable and it is quite impossible for this court to resolve that conflict of evidence. Suffice it to say that both the applicants say that Mr. Podmore expressed surprise at the decision to ask them to withdraw from the course and that this surprise was consistent with their allegation that he and others had led the applicants to believe that the examinations in the subsidiary subjects did not matter, that all that was required was that they should pass them sometime and that, at worst, failure might lead to their being allowed only to take a pass degree. Mr. Podmore denied that he ever led the applicants to believe that these examinations did not matter or that failure could not lead to their being asked to withdraw from the course. He also denied expressing any surprise at the decision, although he said that he may have expressed surprise that neither applicant had done better after having had 2½ months in which to prepare for the referred examination. Similar denials were made by other members of the academic staff who were named as sources of an alleged

general belief amongst students that the results of the subsidiary examinations were of no importance. Both applicants say that if they had known what was at stake they would have worked harder.

At this stage the applicants and other students who were similarly placed, enlisted the support of Mr. Griffin, the president of the guild of students at the university. Mr. Griffin, in writing to the vice-chancellor of the university on 28th September 1967 made four points. (a) *The prospectus was misleading and the fact that Social and Economic History was examinable was not made clear before students began the course.* This point, as I have said, is no longer relied on by the applicants. (b) *Throughout the year, students were informed by certain members of the teaching staff that failure in a subsidiary subject "would not necessarily result in their being sent down":* provided that due weight is given to the word "necessarily", this information was in accordance with the relevant regulations; there is no clear evidence that any member of the teaching staff went further than this, if as far. (c) *There was no properly constituted examiners' meeting convened after the September examinations to discuss individual cases:* this may be correct in that the full board of examiners did not meet before the initial decision was taken but, as will appear, there was such a meeting at a later stage and the point was not pursued in argument. (d) *A number of general tutors were not informed of the results of the referred examinations until after the candidates were themselves informed:* this is true, but it is not clear why this should amount to more than possible discourtesy to the general tutors concerned; the reason for the omission was that some of the tutors were not available and it was not considered desirable to delay publication of the decisions which had been reached.

The vice-chancellor met Mr. Griffin and, as a result of the discussion with him, arranged for enquiries to be made in the relevant department, namely that of Industrial Administration. On 4th October 1967 the vice-chancellor received a full report from Professor Gibson who was head of the department and Dean of the Faculty of Social Science. Having read this report he suggested that the board of examiners should reconsider all the decisions which had been made following the referred examinations. Two days later, after further consideration of this report, he suggested to Professor Gibson that the board of the Faculty of Social Science might consider whether some of the students who had been asked to withdraw from the Behavioural Science course could be re-admitted to read for a pass, as contrasted with an honours degree. Meanwhile, on 5th October 1967 Professor Gibson on his own initiative had convened a full meeting of the board of examiners for Behavioural Science. At that meeting the points raised by Mr. Griffin were considered. The dean also asked if any of the members wished to raise any other matters affecting the decision of the examiners, but no one wished to do so. The board decided that there had been no departure from the correct procedure and that the policy of not having a full meeting of the board to consider the results of referred examinations would be followed in the future, subject to the modification that "in order that justice might more obviously be seen to be done, General Tutors would in future join the subject tutors and the internal examiners in their deliberations". The board unanimously confirmed the decisions taken as a result of the referred examinations. On 6th October 1967, the board of the Faculty of Social Sciences met and discussed the problem of the referred examination results. The board expressed its complete faith in the competence of the board of examiners and agreed that the vice-chancellor's suggestion that some of the students might be allowed to read for a pass degree instead of being asked to withdraw, should be referred to the board of examiners. The faculty board decided to meet again immediately after a special meeting of the board of examiners to be held on 9th October.

When the board of examiners met, they re-examined all the results and confirmed their previous decisions. The board of the faculty met immediately afterwards and confirmed the decisions of the board of examiners.

On 11th October 1967, the matter was reported to the senate which, possibly in ignorance of the full extent of the reconsideration which had already taken place, agreed that the matter should be reconsidered without delay. This was interpreted by the board of the Faculty of Social Sciences as a request for still further consideration and a special meeting was accordingly called for 12th October 1967. The vice-chancellor, who was unable to attend the meeting of the board of the faculty, considers this a misinterpretation, but it is clear that his view was not shared by Professor Gibson, the dean of the faculty, and was probably not shared by a Mr. Wylie who had raised the matter in the senate and was present at the faculty board meeting. This meeting is of some importance to the applicants' case and should therefore be dealt with fully. The dean referred to letters from Mr. Griffin, as president of the guild of students, making specific allegations of statements by members of the staff which, if made, could have misled the students. He reported that the senate had referred the matter back to the board as, to quote the minutes of the board:

"It had been felt by the Senate that a significant case existed for very careful re-examination so as to consider whether uncertainty existed and it was also felt that any benefit of the doubt should go to the students."

After a prolonged discussion it was proposed, again quoting the minutes:

"... that a small group consisting of the Professors in the Faculty should meet the staff and students and report back to the meeting at 4.15 p.m. It was emphasised that the group was not a judicial enquiry but was to try and ascertain whether doubt and uncertainty had existed."

The meeting adjourned at 3.15 p.m. Thereafter the professors met all the students who had failed the referred examinations with the sole exception of the applicant, Pantridge. His absence remains unexplained. According to the applicant Roffey, each of the students—

"... told the meeting how our tutors had interpreted the faculty rules to us to the effect that we would not be sent down, but allowed to re-sit our subsidiary subjects at some later stage."

The faculty board reconvened at 4.20 p.m. and according to the minutes:

"Professor Gibson reported that six students and the President of the Guild had been seen as a group and two members of the staff who had been named in the President's letter had been seen, the third being ill and not available. He stated that while the Professors could not accept the allegations that members of staff had made the categorical statements which students allege had been made it was obvious that the students now firmly and honestly believed that they had been misled. It had also become apparent that the two members of staff themselves might not have been absolutely clear about what the Regulations said and therefore would not have made the categorical statements alleged. The Faculty Board therefore resolved that, while not accepting the allegations made by the students, it was satisfied that there might have been some uncertainty in the minds of some of the students about what would happen to them if they failed referred examinations, that this uncertainty could have affected their performances and in such circumstances it was unfair that the students who had failed referred examinations should be treated differently from one another. It was therefore agreed that in accordance with the special Regulations for the

Degree of Bachelor of Science the six students who had been asked to withdraw from the course should now be allowed to retake the first year examinations in the following year with or without further attendance."

The minutes then record the dissent of one member from this decision and continue:

"After further considerable discussion it was also agreed that the matter should be referred back to the Board of Examiners to: (a) Consider whether any or all of the 11 students should be admitted into the second year, and (b) Prepare, as a matter of urgency, a paper setting out the academic background and potentialities of the 11 students for future reference..."

It is important to note that the board of examiners was not being asked to reconsider the issue whether the students should be allowed to re-sit the first year examination or be required to withdraw from the course. That issue had been decided in favour of the students so far as the faculty board was concerned. What the board of examiners was being asked to decide was whether any, and if so which, of the students should not be required to re-sit the June examination but should be allowed to pass on forthwith to the second year of the course. The board of examiners met on 16th October 1967 to consider this remit. They resolved to advise the faculty board that:

"...they do not consider that there are general grounds for admitting some students to the second year of the Honours Course without re-taking the first year. They consider that students should re-take the first year examinations with, or without, further attendance and as a result of those examinations should be eligible for reconsideration for admission to the Honours Course as well as the Pass Course. Such students would be expected to keep themselves informed of syllabuses and regulations."

The board also prepared a series of academic profiles which showed, inter alia, that the applicant Pantridge secured one per cent. less marks (17 per cent. instead of 18 per cent.) in the referred examination in Social and Economic History than he achieved in June and that the applicant Roffey secured 24 per cent. in Introductory Statistics in the referred examination as compared with 20 per cent. in June and 17 per cent. in Social and Economic History as compared with 16 per cent. in June. The pass mark was 40 per cent. The applicant Pantridge's "profile" attributed his failure to what was described by the general tutor as "a heavy programme of Students' Union activities". It ended with the remark that—

"There was a vague feeling at the Examiners' Meeting, based on class-work marks, that [the applicant] Pantridge was in fact quite able and he was therefore admitted to the second year of the Honours Course."

This is a reference to the June meeting of the examiners and means no more than that the applicant Pantridge was admitted to the second year of the honours course subject to his passing the referred examination. The board of the faculty met again on 18th October 1967, and, with two dissentients, resolved to recommend that the six students who had been asked to withdraw from the course be permitted to take the first year examinations in June 1968, with or without further attendance, and that the question whether they should, if successful then proceed to the second year of the honours degree or the second year of the pass degree be considered afresh in the light of the results then obtained. The board also recommended that the six students be informed as soon as possible and resolved that their recommendations be forwarded to the senate with a recommendation that the matter be treated as one of great urgency.

Professor Gibson told Mr. Griffin and some of the students concerned in confidence what had been decided by the faculty board, explained that this decision required ratification by the vice-chancellor or the senate, but said that his own view was that such ratification would almost certainly be forthcoming.

A special meeting of the senate was held on 1st November 1967 and was devoted exclusively to the results of the examinations in the Behavioural Science course and subsequent events. The senate considered whether to hear the president of the guild of students but decided not to do so, it having been reported that at a meeting of the senate guild joint committee on the previous day no new information or argument had been produced. Professor Gibson outlined the history of the matter and an extensive discussion ensued. Ultimately the senate agreed:

"(i) that the students on the course had been issued with all appropriate Regulations, and that the Special Regulations had been discussed by the Course Tutor; (ii) that the examinations in June and September had been properly conducted in accordance with the Regulations; (iii) that the students concerned had been properly informed about the referred examinations, and that no doubt as to their significance within the Regulations had been established; (iv) that in considering the results, consideration had been given to general appraisal of Tutor's comments of each student's general capacity and potential, promise and personality; (v) that while some students might have had erroneous ideas about the significance of the referred examinations, this was not sufficient to show that students had been misled by the University, and therefore no substantial cause existed for overruling the Regulations."

The senate then resolved by 18 votes to four to confirm the original decision of the board of examiners that the five students be permitted to repeat the first year examinations and that the remaining six be asked to withdraw. This decision was communicated to the applicants and the other students affected by letter dated the same day.

In response to a suggestion by the academic advisory committee, members of the senate met on 7th December 1967. Whether it was a meeting of the senate as such is doubtful as no formal record of the meeting was kept. Mr. Griffin says that it was stressed to the students and their advisers that the purpose was to explain the decision arrived at by the senate and not to reconsider it. The vice-chancellor questioned such of the students as attended, but the applicant Pantridge was not amongst them, as he had been advised by the guild of students not to attend. After the meeting, or at all events after the students had left, the members of the senate questioned the members of the staff who were alleged to have made misleading statements to the students and the vice-chancellor satisfied himself that there was no substance in the allegations.

The university council met on 8th December, considered the relevant papers and heard a report from the vice-chancellor that he was satisfied that there was no substance in any of the allegations. It accepted the vice-chancellor's report and, to quote the vice-chancellor, "... resolved to defend the University against any attack and to issue a public statement". This statement recorded that the council had resolved: "to give complete support to the decision of the senate that the decisions of the Board of Examiners should stand". In the context of the vice-chancellor's evidence, it is reasonably clear that the decision of the board of examiners to which reference was made was that of the two examiners and the two course tutors held on or about 19th September 1967. Although the university's attitude had become clearly and immutably defined by the

beginning of December 1967, the applicants delayed until July 1968 before they applied to this court for leave to bring these proceedings. As a result they lost all chance, if successful, of being admitted for the academic year 1968-69. No explanation for this delay has been offered by either applicant, but Mr. Griffin said that the whole matter was referred to the National Union of Students on whose advice professional legal assistance was sought, the cost being borne by that union's student legal aid fund. He added that statements had to be taken from the students, some of whom had left the university and that it was necessary to find out which of them wished to take legal action.

The applicant Roffey obtained a place at the Regent Street Polytechnic in London and is no longer actively interested in returning to the university. I can understand his wishing to be in a position to refuse an offer by the university to allow him to resume the course, but prerogative writs are a discretionary remedy designed to remedy real and substantial injustice rather than to give satisfaction, however legitimate. In the circumstances his claim must fail on grounds of discretion whatever its substantive merit and I need say no more about it.

The applicant Pantridge has not been so fortunate. Whilst the matter was being debated within the university he was optimistic of the outcome and did not seek a place elsewhere. When he realised that his optimism was misplaced, he applied successfully for admission as a student of London University to read for an external degree in Sociology, but was unsuccessful in obtaining a place at the Birmingham College of Commerce to study for such a degree, the senior tutor telling him bluntly that they had a reputation to keep up and were not prepared to accept drop-outs from the University of Aston. The applicant Pantridge has been forced to abandon academic study and is now working in a stationer's shop training for retail management. He, unlike the applicant Roffey, expresses a real wish and need to return to the university and his application merits serious consideration. Although both the regulations and the letters to the applicant Pantridge speak of a request to withdraw from the course, thus leaving open the theoretical possibility that he might be accepted to read for some other course within the university, it is clear that the reality was that the applicant Pantridge was being sent down. Whatever may be the position elsewhere, students at Aston are members of the university and he was being deprived of his membership. Counsel for the applicants submits that in such circumstances natural justice requires that before the deciding body reaches a decision of such a nature, the applicant Pantridge should be given an opportunity of being heard in his own defence; in other words, the maxim *audi alteram partem* applies.

Counsel for the senate concedes that the concept of natural justice is applicable, but he says that this is a general concept involving lack of bias, accord with any relevant rules and general fairness and is not to be confused with *audi alteram partem*, which is a special rule applicable in only a limited sphere. The prerequisite for its application is that the person concerned must be faced with some sort of charge. If, but only if, this is the case, the rule requires that the charge be made known to him and that he be given the opportunity to rebut it. In the present case, he submits, no charge was made against the applicant Pantridge. His position was quite simply that of a young man who had twice failed his examinations and failed them badly. Any young man so circumstanced should expect to be sent down and had no right to be heard when the university was engaged in the benevolent exercise of deciding whether it could afford to mitigate the necessary penalty. According to counsel's submission, a student who has failed occupies a position analogous to one holding office at pleasure.

In my judgment, it is not right to treat the principle of *audi alteram partem* as something divorced from the concept of natural justice, although it will certainly not apply in every case in which there is a right to natural justice. Where, however, it does apply, it is an integral part of natural justice and may indeed lie at its heart. LORD UPJOHN delivering the report of the Judicial Committee of the Privy Council in *Durayappah v. Fernando* (1) said that outside well-known cases such as dismissal from office, deprivation of property and expulsion from clubs there existed a vast area within which the principle could only be applied on most general considerations. In considering its applicability regard had to be had to the wording of the provisions concerned, in this case the special regulations, and to three matters, namely first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant. Second, in what circumstances or on what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanction in fact is the latter entitled to impose on the other.

The first and third of these matters fall to be considered together in this case. The applicant Pantridge was a student member of the university enjoying the rights and privileges of that status with the chance of achieving graduate status in due time. The sanction which the university was entitled to impose was total deprivation of that status and of the chance of improving it thereafter. Furthermore, the applicant Pantridge found to his cost, an ex-student member of a university may well be in a more disadvantageous position than one who aspires for the first time to student status. There have been more momentous decisions than that made by the examiners in the case of the applicant Pantridge, but there can be no denying its gravity from his point of view.

The second matter falls to be considered with and in the context of the special regulations governing the course. There is much force in the contention of counsel for the senate that examinations are meant to be passed and that those who fail to do so at a university *prima facie* should expect to be sent down. I am quite prepared to accept it as a background against which the special regulations fall to be construed. They, however, provide a most elaborate code which almost effaces the background. We are concerned with the qualifying year which determines whether the student moves on to study for an honours degree, to study for a pass degree, or has to leave the university. It is only in the latter case that membership of the university—a body with some of the attributes of a club—is in question. If the student passes in all major subjects at honours standard and in subsidiary subjects at pass standard, he moves on to the honours degree course automatically (special reg. 4 (b)). If he achieves pass standards in all subjects, he moves on to a pass degree course (special reg. 4 (c)). If he fails to achieve a pass standard in a major subject, he may be permitted to take a referred examination in that subject at the discretion of the examiners and, if successful, will move on to the pass course (special reg. 4 (d)). If he fails to achieve pass standards in either or both subsidiary subjects and, I assume although it is not so stated, achieves honours standards in the major subjects, he may on the recommendation of the examiners be permitted to take referred examinations in these subjects and, if successful, may be permitted to proceed on the honours course (special reg. 4 (e)). It is not stated to whom the recommendation is to be made and who decides, or why under this regulation the examiners recommend rather than exercise their own discretion. If he fails in more than one major subject (of which there are three and the applicant

(1) [1967] 2 All E.R. 152; [1967] 2 A.C. 337.

Pantridge was successful in them all) or fails in a referred examination (which the applicant Pantridge did in the case of one subsidiary subject), he may at the sole discretion of the examiners re-sit the whole examination or may be required to withdraw from the course. In the event of his being successful in the re-sit examination he would normally proceed to the pass degree only (special reg. 4 (f)). The regulations enjoin examiners in deciding whether to allow students to re-take examinations to have regard to their performance in non-examinable subjects (special reg. 4 (g)) and with an escape clause providing that students may not *normally* (my emphasis) proceed to the second year of the course until they have satisfied the examiners in the examinations as a whole (special reg. 4 (h)). They could quite properly have provided, but did not provide, that the examiners should be under no obligation to afford the students any opportunity to make representations to them, before making a decision. Had the regulations taken this form, no problem would have arisen.

I have dealt with these regulations at length because it seems to me that they largely destroy the *prima facie* approach of "pass or go down". Their elaboration continues in relation to the honours course, the honours final, the pass degree course and the pass final. Of these, reg. 6.4 (b) which applies to the pass degree course is important, not because it is of direct application, but because it shows a contrasting approach to that indicated by reg. 4 (f) under which the applicant Pantridge was sent down. That regulation provides that—

"Any student who fails to satisfy the examiners in not more than two subjects may at the discretion of the examiners be permitted to take a referred examination in these subjects. Students failing to reach pass standard in three or more subjects, or who fail a referred examination, may not normally proceed further on the course."

Here alone is the "pass or go down" approach to be seen. Scarcely a body in the university failed to make a recommendation or a decision in the case of the applicant Pantridge and his fellow students. No doubt their interventions were inspired by the most laudable of motives, although their lack of unanimity was in many ways unfortunate. The fact remains that whilst other bodies might be able in practice to temper the wind to the failed student, the only body invested by the regulations with the power and discretion to decide whether or not the applicant Pantridge should be sent down was "the examiners". For my part I am inclined to think that, as the regulations stand, this means the full board of examiners, but the decision was in fact taken by a smaller body and no objection has been taken on that account. For the purposes of this case, I shall assume that theirs was the discretion and theirs the decision.

I can understand it being argued on the regulations that regard was to be had primarily and possibly exclusively to the examination results and performances in non-examinable subjects. However, the examiners themselves did not adopt this approach, as I think rightly, and they considered a wide range of extraneous factors, some of which by their very nature, for example personal and family problems, might only have been known to the students themselves. In such circumstances and with so much at stake, common fairness to the students, which is all that natural justice is, and the desire of the examiners to exercise their discretion on the most solid basis, alike demanded that before a final decision was reached the students should be given an opportunity to be heard either orally or in writing, in person or by their representative as might be most appropriate. It was, in my judgment, the examiners' duty and the student's right that such audience be given. It was not given and there was a breach of the rules of natural justice.

In the course of the argument it was submitted that students who had failed their examinations were in no better position than those who applied for admission as students, the latter plainly having no right to be heard, but this in my judgment overlooks the accrued status of the students as members of the university. Reference was also made to the immigrant cases such as *Re K. (H.) (infant)* (1), *Re A. (an infant)*, *Re S. (N.) (an infant)* (2) and *Schmidt v. Secretary of State for Home Affairs* (3), but these are not really analogous. The industry of counsel enabled us to be referred to a decision of the courts of New South Wales, *Re University of Sydney, Ex p. Forster* (4), which bore a striking similarity on its facts, but there the issue was not a right of audience, but an alleged absolute right to remain a member of the university irrespective of examination results. The court denied the existence of any such right, but its existence has not been suggested in the present case.

This by no means concludes the matter in the applicant Pantridge's favour, because it is not in all circumstances that a breach of the requirements of natural justice will give rise to prerogative redress. The remedies are discretionary and a very important factor is the likelihood that the ultimate decision would have been any different, if a right of audience had been extended to the applicant Pantridge. It is in this context that the history of the affair after the initial decision is of relevance, but is difficult to evaluate. In the course of the argument counsel for the applicants was asked whether there was any further information which the applicant Pantridge wished to place before the court, but, after taking instructions, counsel said that there was none.

The fact remains that the examiners who reached the initial, and as I think the only directly relevant, decision, were wholly unaware of the widespread allegations that the students had been misled by members of the staff as to what was at stake when they prepared, or failed to prepare, for the examinations in the subsidiary subjects and for the referred examinations in those subjects. Would the knowledge have made any difference? It may well be thought that the applicant Pantridge achieved only derisory marks (17 per cent. in the referred examination), but students with 22 per cent. and 25 per cent. were permitted to repeat the first year. When one tries to assess the probable outcome on the basis of the attitude of the full board of examiners, the board of the faculty, the academic advisory committee, the senate and the council, all of whom knew of the allegations and either had investigated them or knew the results of such investigations, the problem becomes more difficult still. None of these bodies regarded the allegations as proved, but some clearly took the view that the students honestly believed in their truth. The board of the faculty, acting on the basis of the professors' interview with the students, intended to exercise the discretion which they mistakenly thought that they possessed in favour of the students. The academic advisory committee clearly thought that the principles of good administration required that both students and staff be heard by the senate. In my judgment it is impossible to project subsequent attitudes backwards in point of time and to determine what the examiners would have done if they had heard the students' allegations, before making a decision.

In this situation I regard the time factor as decisive. The prerogative remedies are exceptional in their nature and should not be made available to those who sleep on their rights. The applicant Pantridge's complaint is that he was not allowed to re-sit the whole examination in June 1968 and, if successful, proceed

(1) [1967] 1 All E.R. 226; [1967] 2 Q.B. 617.

[2] [1968] 2 All E.R. 145; [1968] Ch. 643.

(3) [1969] 1 All E.R. 904.

(4) [1963] S.R. (N.S.W.) 723; [1964] S.R. (N.S.W.) 1000.

to the pass degree course in the 1968-69 academic year, yet he did not even apply to move this court until July 1968. By such inaction, in my judgment he forfeited whatever claims he might otherwise have had to the court's intervention. I would therefore refuse the relief sought.

BLAIN, J., read the following judgment: The grounds put forward in support of this application are that the decision of the senate of the University of Aston in Birmingham or alternatively the decision of the examiners for referred examinations for which the applicants sat unsuccessfully in September 1967 was a nullity in that it was arrived at in a manner contrary to natural justice. In *Russell v. Duke of Norfolk* (1) TUCKER, L.J., said :

"There are . . . no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Those words were quoted by LORD HODSON in his speech in *Ridge v. Baldwin* (2), the case in which LORD REID reviewed most of the leading cases and delivered the modern classic speech on the subject. LORD REID said that one reason why authorities in the past have been difficult to reconcile is the failure to appreciate the difference between various kinds of cases in which it has been sought to apply the principle. He instanced among different categories of case: (i) Cases of dismissal. And these he divided into three classes: (a) dismissal of a servant by a master; (b) dismissal from an office held during pleasure; (c) dismissal from office where there must be something against a man to warrant his dismissal. (ii) Deprivation of membership of a professional or social body. Membership of the Stock Exchange or membership of any members' club are instances, quite apart from the membership of a trade union (where the common law rights may be clouded by special considerations). (iii) Deprivation of property or interference with personal rights by the processes of administrative law.

I do not think that LORD REID's classification was intended to be exhaustive. Indeed he virtually said as much himself when suggesting that the reason for apparently irreconcilable decisions in the past was the failure to appreciate the great variety of contexts in which the concept of natural justice might arise. In the instant case the facts, the history and what I may loosely call the constitution of the university and its constituent or subordinate bodies have been summarised by DONALDSON, J. In my opinion they indicate that these student applicants fall into the second category named by LORD REID. They were members of the university—that is a status akin to membership of a social body, a club with perhaps something more than mere social status attached to it, in that so long as they remained students they were potential graduates and potential holders of degrees which could prove advantageous in professional or commercial life.

Approaching their application in that way three questions arise: (i) Is the concept of natural justice applicable at all? That much is conceded and rightly so. (ii) When the senate or the examiners (as the case may be) decided that these students should be required to withdraw from the course, was that decision arrived at in accordance with the principles of natural justice? The markings of the examination papers are not criticised and this comes down to a question

(1) [1949] 1 All E.R. 109.

(2) 127 J.P. 295; [1963] 2 All E.R. 66; [1964] AC. 40.

whether the applicants should have had an opportunity, which they did not have, to justify or explain their failure. In other words was this a case for *audi alteram partem*? (iii) If in making its decision the deciding body did not act in accordance with the principles of natural justice, should this court interfere with the decision in the exercise of its discretion to make a prerogative order or orders?

(a) I share DONALDSON, J.'s view that the right to be heard is often an example of and an integral part of the concept of natural justice and also his view that it is not always a necessary ingredient of that concept. Was it a necessary ingredient here? I do not conceal the fact that I have found that a very difficult question to resolve in my mind. (b) The first consideration is: what body or what arm of the university took and was empowered to take the effective decision complained of? Article 12 of the university's charter made the senate the supreme academic authority of the university and section xix of the statutes prescribed the senate's powers, including in para. 10 the power to regulate all university examinations and to appoint examiners, and in para. 27 of the power to make regulations in the exercise of the senate's general powers. (c) The senate approved general regulations on 1st July 1966 and special regulations for the course for the degree of B.Sc., with honours in Behavioural Science on 15th March 1967. General reg. 6 provides:

"Candidates who fail to satisfy the examiners in examinations other than final examinations may as the examiners determine either (a) be referred in such subject or subjects in accordance with the appropriate Course Regulations, or (b) resit, on one subsequent occasion only, in the following Academic year, the whole examination with or without further attendance, or (c) be required to withdraw from the Course."

Special reg. 4, so far as relevant, provides:

"Part I (Qualifying) (a) The following subjects shall be studied, and except where marked [with an asterisk] candidates must present themselves for examination towards the end of the third term of the first year. Major subjects: i) Elements of Psychology ii) Elements of Sociology iii) Elements of Economics

"Subsidiary subjects: iv) Social and Economic History v) Statistics . . .

(e) Any student who fails to achieve a pass standard in Statistics and/or Social and Economic History may on the recommendation of the examiners be permitted to take referred examinations in these subjects, and may, if successful, be permitted to proceed on the Honours Course."

This does not indicate to what body the examiners' recommendation is to go—presumably either the senate or possibly the faculty board, but it is not a question which needs to be resolved in these proceedings since the applicants were in fact permitted to and did take referred examinations and it is their failure in such referred examinations that brings them here.

"4 (f) Students who fail in more than one major subject, or who fail in a referred examination, may at the discretion of the examiners, resit the whole examination or may be required to withdraw from the course. Students who are successful in such resit examinations shall normally be eligible to proceed to the Pass Degree only."

This, in my view, clearly indicates that the decision whether a student failing such a referred examination should re-sit the whole examination or withdraw from the course is in the sole discretion of the examiners and no higher or other body. If this be right the question is whether the examiners *before deciding to require the applicants to withdraw from the course* should have afforded them the

opportunity to explain or mitigate their failure either orally or in writing. The decision was first taken or communicated to the applicants on 20th September 1967 and I start by considering whether at that date there had been a failure of natural justice. In the light of their somewhat dismal failure (particularly in the case of the applicant Pantridge) plus what this court knows from what have been called the "academic profiles" subsequently prepared, I find it hard to believe that even a personal interview before the decision of the examiners could have contributed to any different decision, but (as LORD REID said in *Ridge v. Baldwin* (1)) it is at least doubtful whether that is relevant and I eliminate it from my mind.

It may well be that the examiners would have been entitled to decide purely on the examination results (I have detected nothing in special reg. 4 or elsewhere to inhibit this) but from para. 10 of the affidavit of the course tutor, Mr. Hall, it is clear that on 19th September 1967 the marks and also the students' records throughout the year were considered by the board of examiners (and very properly so, in my view) before the decision to require their withdrawal was taken. In such circumstances, and particularly since in effect the decision was one resulting in the applicants being sent down (albeit not for any disciplinary misdemeanour but for failure to make the grade) in my view common fairness demanded an opportunity for representation to be made by or on behalf of the applicants—I do not go so far as to say necessarily a personal interview. But this is not the end of the question. In *Ridge v. Baldwin* (1), LORD REID said:

"I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh after affording to the person affected a proper opportunity to present his case then its later decision will be valid."

I find it necessary therefore to consider what happened after 20th September 1967—a whole series of events enumerated by DONALDSON, J. There were personal interviews with the tutor (on 25th September); representations by the president of the guild of students to the vice-chancellor (on 28th September); a report from the dean of the faculty to the vice-chancellor (on 4th October); a meeting of the board of examiners (on 5th October); a meeting of the faculty board (on 6th October) a meeting of the board of examiners (on 9th October); and a subsequent meeting of the faculty board on the same day; a report to the senate (on 11th October); a further meeting of the faculty board (on 12th October); later on 12th October a meeting between a group of the professors in the faculty and all the students who had failed the referred examinations, except the applicant Pantridge who failed to attend—at this meeting the students who attended made their explanations to the group of professors who decided to go into the academic backgrounds of the students concerned; a meeting of the board of examiners (on 16th October); production of the "academic profiles" by the board of examiners; another meeting of the faculty board (on 18th October) which recommended that the applicants and others required to withdraw should be permitted to re-sit in June 1968; unofficial notification to the students of this recommendation; a meeting of the senate itself (on 1st November) which "confirmed" (or purported to confirm) the original decision of the examiners and this was communicated to the applicants on that day.

It is clear that at all levels all concerned were at pains to do what they believed to be their proper duty to the students concerned. But the fact remains that the

body entrusted with the decision remained the examiners. Among those various meetings, therefore, it is the meetings of the examiners which are important in this court. The minutes of the meeting of the board of examiners on 16th October are illuminating. At this meeting Professor Gibson, the dean, is reported as setting out the background to the meeting and informing those present that the faculty board had "considered fresh information made available to it and had made enquiries amongst students and members of the staff". This is clearly a reference to what had occurred four days earlier when the faculty board had adjourned at 3.15 p.m. and reconvened at 4.20 p.m.—a group of the professors in the faculty having interviewed six students and the president of the guild of students meanwhile (indeed the adjournment had been for this express purpose). In the light of what occurred on 12th and 16th October I find it impossible to say that by 16th October the examiners were not fully possessed of the students' explanations for failure in the referred examinations. But the examiners, doubtless considering that the matter had passed out of their hands, did nothing to alter or affirm their original decision. Had they made a fresh decision it could have been come to, in my opinion, in accordance with the concept of ordinary fairness—of natural justice—whichever way the decision had gone, because they would have had the benefit of the students' representations (albeit obtained through the channel of the interviews and opportunities for interview with the group of professors on 12th October). As it is they, that is, the examiners, did not reconsider their decision of 20th September. So far as the students are concerned they simply received notification dated 1st November 1967 purporting to confirm their non-eligibility. Consequently if this were an application for an absolute right I personally should be in favour of granting relief. But the matter does not end there. This court does not lightly exercise its discretion to grant prerogative orders—not only is real injustice a necessary ingredient before any such application is granted, but it should, in my view, be granted only where diligence is shown by an applicant in real need of the remedy.

In the applicant Roffey's case there is no real need and indeed counsel for the applicants very properly does not press his application. So far as the applicant Pantridge is concerned the position seems to be this: first, he went up to the university (or the college of advanced technology as it was before grant of the royal charter) in October 1965; secondly, he changed from being a student in another course in January 1967. It was in June and September 1967 that he failed his examination and referred examination respectively. Thirdly, on 1st November 1967 he received notification that the original requirement to withdraw from the course dated 20th September 1967 was confirmed. Fourthly, not until 19th July 1968 did he seek from this court leave to move, although his complaint is that he should have been allowed to re-sit the whole examination in June 1968, and fifthly, effectively, therefore, his application could not have resulted in a re-sit until June 1969 four years after entering the university and it probably could not now result in an effective re-sit before June 1970. This court should not be used for the creation of a real life counterpart to Chekhov's perpetual student, and I would refuse to exercise discretion and dismiss the application.

LORD PARKER, C.J.: I have had considerable doubts about this case, but having had an opportunity of reading the two judgments just delivered, I am not prepared to differ from the conclusion that there has been here a breach of the rules of natural justice. In my judgment, however, this conclusion is only justified on the particular facts of this case. I have in mind the precise wording of the special regulations and in particular special reg. 4 (f), and the fact that

the examiners, in exercising their discretion, were prepared to take into consideration the personal difficulties and problems of each student. I have, however, no doubt at all that this court, in the exercise of its discretion, should not give the relief claimed.

Applications dismissed.

Solicitors: *Hyman Isaacs, Lewis & Mills; Sherwood & Co., agents for Johnson & Co., Birmingham.*

T.R.F.B.

COURT OF APPEAL

(LORD DENNING, M.R., SALMON AND KARMINSKI, L.JJ.)

March 3, 4, 5, 6, 27, 1969

SLOUTH ESTATES, LTD. *v.* SLOUGH BOROUGH COUNCIL AND ANOTHER

Town and Country Planning—Development—Permission—Permission granted in 1945—Subsequent application for development of part of area refused—Compensation accepted for loss of development value—Inconsistency with 1945 permission.

In 1945 the owner of a large industrial estate of some 500 acres in extent submitted to the local authority an application for planning permission in respect of 240 acres, then undeveloped, shown coloured on a plan. By mistake permission was granted for development of an area shown uncoloured on the plan. No action was taken by the owner on this permission, and between 1945 and 1955 new separate applications were made for permission to erect factories on 150 acres of the 240 acres. In 1955 the owner applied for permission to erect industrial buildings on the remaining 90 acres which was refused. In consequence he recovered £178,545 compensation under s. 59 of the Town and Country Planning Act 1954. The owner now claimed to be entitled to proceed under the 1945 permission which he contended was still in force.

HELD: in the light of the plan, with which the 1945 permission must be construed, that permission must be taken to apply to the 240 acres, and it was still valid in 1955, but by claiming compensation in 1955 the owner had elected to exercise a right inconsistent with the continued validity of that permission, and so had abandoned any right which they had under it.

APPEAL by Slough Estates, Ltd., from an order of MEGARRY, J., dated 15th February 1968, dismissing the plaintiff's action for a declaration (i) that the plaintiff was entitled to the benefit of a valid planning permission effective as an outline permission for the purpose of the Town and Country Planning Act 1962; (ii) that the permission related to that portion of the plaintiff's trading estate which was undeveloped on 17th October 1945 on the ground that in construing the planning permission it was inadmissible to look at the surrounding circumstances. The plaintiff served a notice that the judgment should be affirmed on the additional ground that the permission was void by reason of uncertainty as to its meaning and effect.

Douglas Frank, Q.C., Charles Sparrow, Q.C., Patrick Freeman and David Keene for the appellants company.

J. L. Arnold, Q.C., Jeremiah Harman, Q.C., and Elizabeth Appleby for the Slough Borough Council and the Buckinghamshire County Council.

Cur. adv. vult.

27th March. The following judgments were read.

LORD DENNING, M.R.: The Slough Trading Estate is owned by the company, Slough Estates, Ltd. It lies astride the main railway line to the west. It is some 500 acres in extent. By 1944 half of it had already been developed for factory buildings. This development covered a floor space of 3,471,396 square feet. The end of the war was in sight. The company looked forward to post-war development. In 1944 the company's surveyor made a plan showing how the remaining half of the estate, some 240 acres then undeveloped, could be laid out. I will call it the "1944 layout". It was dated 12th December 1944. It showed new roads, factories, electric generating station, car parks, and 15 acres marked "no development". The floor area of the proposed new factories was given as 2,647,697 square feet.

On 22nd January 1945, the company's surveyor, by letter, submitted the 1944 layout, as an interim development measure, to the local authority. The local authority gave it the number U.L.21. On 8th October 1945, the local authority approved it by a resolution which was noted in the local authority minutes in this way:

Plan No.	Applicant and Proposed Development	Town Planning
U.L.21	[the company] Lay-out of Undeveloped portion, Trading Estate	Approved

On 17th October 1945, the local authority, by their town clerk, issued a planning permission which is the key document in this case. I will call it the "1945 permission" and I will set it out in full:

"Application No. U.L.21.

To: [the company]

... the [local authority] as Interim Development Authority hereby permit the land situate at the Trading Estate at present undeveloped, and shown uncoloured on the plan submitted, to be used for industrial purposes, subject to the submission by the developer and subsequent approval by the [local authority], or by the Minister of Town and Country Planning on appeal, of particulars of the proposed development (and to compliance with the conditions specified hereunder:—

That further particulars of the proposed development be submitted and approved in due course.

The reasons for the [local authority's] decision to grant permission for the development, subject to compliance with the conditions hereinbefore specified:—

To ensure that development shall comply with the Planning Scheme now in course of preparation.)

DATED the Seventeenth day of October, 1945.

J. H. Warren, Town Clerk."

The company says that the 1945 permission is still in force; and that, by virtue of it, it is entitled to erect factory buildings on large open spaces without getting industrial development certificates. The local authority says that it has long since been abandoned. I will assume for the moment that it is still in force, and seek to construe it, so as to see if it bears the wide import claimed by the company.

1. The construction of the 1945 permission.

The first problem is caused by the word "uncoloured" in the phrase: "shown uncoloured on the plan submitted." The plan submitted was the 1944 layout U.L. 21. It showed proposed development for industrial purposes on the *coloured* portion, and not on the *uncoloured* portion. The coloured portion was coloured yellow for proposed roads, pink for proposed factories, green for proposed open spaces, and so forth. The portion which was uncoloured showed the then existing development (of 250 acres) and a few odd bits scattered about for which there were no proposals. That word "uncoloured" was, in the permission, obviously a mistake. By no possibility could anyone think that the local authority had given permission to develop the *uncoloured* portion, when the plan showed that the company wanted to develop the *coloured* portion and to build on it factory buildings covering 2,687,652 square feet.

The learned judge thought that this mistake could not be corrected and that the permission must be construed literally so as to give permission for industrial purposes on the *uncoloured* land; although he confessed that he found this unattractive. It is not only unattractive. It is absurd. And I decline to give this permission such an absurd effect. It would mean that we would foist on to the company something for which it never asked and which was no good to it at all. If there were no other way out of the difficulty, I would hold the permission bad for uncertainty, or, at any rate, absurdity, or I would rectify it so as to give effect to the proved intention of the local authority, if proceedings were brought for that purpose.

But I think there is a way out. The permission must be construed together with the plan which was submitted and was incorporated into it, see *Wilson v. West Sussex County Council* (1). I confine myself to the plan. I do not think it is permissible to look at the resolution of the local authority or the correspondence, for neither of them was incorporated into the permission, see *Miller-Mead v. Minister of Housing and Local Government* (2) per UPJOHN, L.J. The reason for excluding them is this: The grant of planning permission has to be in writing (see the Town and Country Planning (General Interim Development) Order 1945, art. 12) and it runs with the land. The grant is not made when the local authority resolves to give permission. It is only made when its clerk, on its authority, issues the permission to the applicant. Seeing that it has to be in writing, one can only look to the permission itself and the documents incorporated in it. In this case there was one important document incorporated in the permission. It was the "plan submitted" showing the 1944 layout U.L. 21 with all the colours and wording on it. In the light of this plan, I think the only sensible way of interpreting the permission is to reject the word "uncoloured" as being absurd and inapplicable (see *The Merak* (3)) and to hold that permission was given to develop that portion of the trading estate which was at that time undeveloped as shown on the plan. That is, the 240 acres or thereabouts, both coloured and uncoloured. It was what we would call today an outline permission. The colours and wording on the plan showed the proposals in outline, but not in such a way as to bind either the company or the local authority to the details. The details were to be worked out later, by the company, submitting particulars, and by the local authority approving, or disapproving them. Thus the site of the roads might be varied. The floor area of the factories might be increased or diminished. And so forth.

(1) 127 J.P. 243; [1963] 1 All E.R. 751; [1963] 2 Q.B. 764.

(2) 127 J.P. 122; [1963] 1 All E.R. 459; [1963] 2 Q.B. 196.

(3) [1965] 1 All E.R. 230; [1965] P. 223.

The second problem in the 1945 permission is the meaning of the words: "to be used for industrial purposes." Does this authorise the company to erect factory buildings? Or is it limited to using the 240 acres for roads, car parks, and so forth, without buildings? The answer is again to be found by reference to the plan submitted. It clearly includes the erection of factory buildings. And there is this very important point to be noticed: At that date in 1945 there was no need for the developer to obtain from the Board of Trade an industrial development certificate. The need for such a certificate was only introduced in 1947 by s. 14 (4) of the Town and Country Planning Act 1947. It did not apply to pre-1947 permissions. So this 1945 permission (if it is still in force) has the enormous advantage that the company can erect factory buildings on these 240 acres (save for the 15 acres marked "no development") without getting industrial development certificates. That adds greatly to the value of the permission, see *Viscount Camrose v. Basingstoke Corpn.* (1).

There is one other thing to be noted on the 1945 permission. It is the reason for the condition. It was stated to be "To ensure that development shall comply with the Planning Scheme now in course of preparation". That planning scheme was altered from time to time. But it blossomed out into a full-blown development plan which was the subject of an inquiry in July 1952 by an inspector from the Ministry. The development plan contained important differences from the 1944 layout. Large areas which had previously in 1944 been allocated for industrial purposes were not in 1952 scheduled as open spaces. At the inquiry, the county council, through its clerk, appears to have acknowledged that the 1945 permission was valid and that, if it was to be revoked so as to provide for these open spaces, the company would be entitled to compensation.

2. Abandonment.

Thus far I have assumed that the permission of 1945 is still in force. But now comes the crux of the case. The local authority says that the company abandoned it many years ago and cannot now revive it.

One thing is quite clear. The company, never acted on the 1945 permission. It behaved for many years as if it never existed. It made a large number of new planning applications to erect factories on parts of these 240 acres, but it has in each case made a separate new application for each factory, and it has accompanied each one by an industrial development certificate, wherever the factory was of a size to require it. These separate applications were spread over the 20 years from 1945 to 1965. The company never referred to the 1945 permission, nor did it purport to give particulars under it. Many of these applications have been granted. Permissions have been given. Factories have been erected. These buildings are very different from those proposed in the 1944 layout. For instance, several acres which were proposed in 1944 as a car park coloured green are now covered with factory buildings. In sum total, out of the 240 acres, factories have been built on about 100 acres, permission has been given for another 50 acres, leaving 90 acres outstanding. But in respect of these 90 acres, there was a very significant happening. In 1955 the company applied for permission to erect industrial buildings on the 90 acres. Permission was refused. And in consequence of the refusal the company recovered from the government compensation amounting to £178,545.

Now the company wishes to resurrect the 1945 permission. It says that it is still in force and that it is entitled to erect factory buildings on these 90 acres without getting industrial development certificates in respect of it. The local authority retorts that, as the company in 1955 received compensation for loss

of development value, it cannot now claim that the 1945 permission is still in force.

In order to appreciate this point, I must state the circumstances in which the company applied for and received the compensation. On 1st October 1954, the Minister approved the development plan for this area. It showed that 12½ acres were allocated for allotments and for playing fields, and that 77½ acres for nursery and market gardens. Two months later, on 25th November 1954, Parliament passed the Town and Country Planning Act 1954. It set up a fund of £300,000,000, out of which to compensate landowners who were refused permission to develop their land. In particular, it contained in s. 59 a special section dealing with industrial buildings which would normally require an industrial development certificate. Section 59 provided that, if a landowner owns land which was ripe for industrial development, but he was likely to be refused permission to develop it, he could get compensation without getting an industrial development certificate. All that he had to do was to submit an outline planning application for an industrial building, get the planning authority to certify that they would have refused it, and he was entitled to compensation as for a refusal of planning permission.

The company acted under s. 59. It instructed its agents, who made on 1st April 1955, two applications, as follows. One was an outline application to erect industrial buildings on the 12½ acres of land. The company filled in a form of application on which there was a special request to give "Dates of any previous application for development permission". The company replied: "Application U.L.21: 22.1.45 (plan dated 12.12.44)". On 3rd May 1955, the local authority refused the application on the ground that the proposed development was contrary to the development plan whereby the area was allocated for allotments and for playing fields. On 19th May 1955, the company put in a claim to the Minister for compensation for full loss of development value in respect of this site. On 30th January 1957, the compensation was determined at £60,214 17s. 2d. On 8th February 1957, it was paid to the company. The other was an outline application to erect industrial buildings on about 80 acres of land. The same drill was gone through. The company filled in the form referring to U.L.21. The local authority refused on the ground that the area was allocated as a nursery and market garden. The company claimed compensation for full loss of development value, and received it in the sum of £118,330 5s. 9d. for 77½ acres.

Now the company seeks to resurrect the 1945 permission. In so doing it is acting inconsistently. In 1955 it made claims for compensation on the footing that it had lost all development value of these 90 acres. It received £178,545 accordingly. Now it turns round and says that it never lost any of the development value, but that it is entitled to develop the 90 acres as of right by virtue of the 1945 permission.

Counsel for the company, admitted that the company is acting inconsistently. It was negligent or foolish in 1955, he said, but not dishonest. It ought never to have applied in 1955 for compensation, or taken it. But albeit it was negligent or foolish, that did not mean that it had abandoned the 1945 permission. It could still rely on it, he said, but the only consequence was that, when it erected factory buildings on the 90 acres, it would have to pay back the compensation of £178,545 it received. (But it would not, he said, have to pay any interest on it for all the years it had the use of it.) It was open to the local authority he said, to revoke the permission on the 90 acres (if it thought that good planning required it): but in that case, he said, the local authority would have to pay the company compensation at current values, which might amount

to £3½ million, against which the company would be good enough to give credit for the £178,545 it had received, but no interest for the intervening years.

The judge accepted this argument. He said:

"I do not think there can be any general doctrine that he who acts inconsistently with a planning permission thereby abandons it . . . What must be shown, I think, is a positive intention never to rely on a planning permission, not merely an intention not to rely on it now . . . To make a claim which is inconsistent with a right does not, without more, show an intention to abandon that right."

I cannot agree with the judge on this point. He said that the officers of the company may have forgotten about the 1945 permission. I do not accept that for one moment. None of their officers gave any evidence of forgetting about it. On the very forms in 1955 in which they applied for compensation, they mentioned explicitly U.L.21 which was their 1945 application. They obviously had the file before them: and this, no doubt, included the 1945 permission.

Once knowledge is shown, the company is defeated by the doctrine of abandonment: or, as I would prefer to put it, by election between inconsistent rights. This was fully considered by the House of Lords, in *United Australia, Ltd. v. Barclays Bank, Ltd.* (1). That case shows that when a man is entitled to one of two inconsistent rights, then if he, with full knowledge, has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other. That is what LORD ATKIN said. By choosing the one, he has elected to "abandon" the other. But the word "abandonment" is misleading. It smacks of intention. That is what misled the judge here. He thought there must be an intention to abandon. But, in this branch of the law, it is not the man's intention which matters. It is his conduct. Whether he intended it or not, if he has knowingly done an unequivocal act—by which I mean an act which would be justifiable if he had elected one way, and would not be justifiable if he elected the other way, that is an election. He cannot go back on it, see *Scarf v. Jardine* (2) per LORD BLACKBURN. It is not open to him to say: "I will accept the one right but I will not give up the other." If he does accept the one right, then by law he waives—he "abandons"—the other, and nothing which he can say by way of protest against the law will avail him anything, see *Matthews v. Smallwood* (3) per PARKER, J.

So here the company had a choice in 1955 between two inconsistent rights. One was to claim compensation for loss of development value. The other was to retain the development value in the shape of the 1945 permission. Given those two inconsistent rights, the company did an unequivocal act—it claimed and accepted £178,545 for loss of development value. That would be justifiable if it elected to abandon the 1945 permission, but it would not be justifiable if it retained it. By accepting the compensation, it made its election and cannot go back on it. By law it has waived, or, if you like to put it so, "abandoned" the 1945 permission.

The judge seems to have had some recollection of this doctrine, but it was imperfect. He said:

"No doubt procedural and other difficulties may confront a man who seeks to blow hot and cold, but I do not think there is any doctrine that if two inconsistent claims are made, the making of the later claim ipso facto constitutes an abandonment of the existing claim."

(1) [1940] 4 All E.R. 20; [1941] A.C. 1.

(2) [1881-85] All E.R. Rep. 651; (1882), 7 App. Cas. 345.

(3) [1908-10] All E.R. Rep. 536; [1910] 1 Ch. 777.

That is true when it is a choice between one of two alternative remedies. But not when it is a choice of one of two inconsistent rights. And here, as I see it, the company in 1955 had a choice between two inconsistent rights: and, having adopted one, it cannot now pursue the other.

Conclusion.

I come to the same result as the judge, but for different reasons. I think that the 1945 permission did cover the development of the 90 acres, by the erection of factory buildings, according to the 1944 layout: but I think that the company, by accepting compensation for loss of development value, is precluded from saying that the 1945 permission is still in force.

I am not sorry to come to this result. This old permission of 1945 was dead for 20 years. No one acted on it. Now the company seeks to resurrect it so as to ground either a claim to erect factory buildings on 90 acres at a great profit (contrary to good planning) or to get some £3½ million compensation out of the ratepayers. It has done nothing to earn such vast compensation save to put in a layout plan 24 years ago. I do not think it should have it. I would dismiss this appeal.

SALMON, L.J.: Whatever may be doubtful in this case, it seems to me crystal clear that the word "uncoloured" was inserted by mistake in the planning permission dated 17th October 1945. In order to discover the true meaning of this planning permission we are entitled to consider it in the light at any rate of the layout plan to which it refers: *Wilson v. West Sussex County Council* (1). This layout plan shows industrial development consisting of a large number of proposed new factories coloured pink, together with proposed new roads, canteens, power stations, car parks and open spaces all ancillary to the proposed new factories and designated in different colours on the plan. This proposed development covered in all an area of about 250 acres of the Slough Trading Estate. The uncoloured parts of the layout plan covered the rest of the estate consisting of about 350 acres all of which—but for a few odd pieces—was then already developed. Clearly no development of these few odd pieces was even being considered in 1945. The learned judge, however, construed the planning permission literally and held that it applied, and applied only, to these odd pieces. He said that this produced a result which in his words was "not attractive" nor "very sensible". This certainly is a remarkable understatement for this construction produced a result which, to my mind, is in reality both repugnant and ridiculous. If ever a document contained an obvious mistake, the insertion of the word "uncoloured" in this planning permission is surely such a mistake. It clearly could not have been what the local authority intended, and indeed we know that it was not, from the resolution of 8th October 1945 approving planning permission as shown on the layout plan. Equally clearly neither the company nor anyone else to whom the permission and plan may have been shown could have thought that the planning authority had inserted the word "uncoloured" except by mistake. Planning authorities like everyone else sometimes make mistakes but they are not insane; nor should they be presumed to be perpetrating a bad joke.

It has been held that in construing a planning permission reference cannot be made to the application for permission, nor indeed to any other document (*Miller-Mead v. Minister of Housing and Local Government* (2)) save documents referred to in the permission: (*Wilson v. West Sussex County Council* (1)).

(1) 127 J.P. 243; [1963] 1 All E.R. 751; [1963] 2 Q.B. 764.

(2) 127 J.P. 122; [1963] 1 All E.R. 459; [1963] 2 Q.B. 196.

The basis for the decision seems to have been that the grant of planning permission which must be in writing (Town and Country Planning (General Interim Development) Order 1946, art. 12) runs with the land (s. 18 (4) of the Town and Country Planning Act 1947) and a purchaser from the applicant will probably not have access to any of the documents contemporaneous with the grant of planning permission. In the *Miller-Mead* case the grant of planning permission had been made to the plaintiff's predecessor in title, and it was held that the contemporaneous documents could not be looked at; certainly not for the purpose of attempting to cut down the permission in the grant. I desire to reserve the question whether the *Miller-Mead* rule applies when a dispute about the true construction of the grant arises as between the planning authority and the original grantee. For the purposes of this case, however, I assume that in construing the grant we are not entitled to look at the resolution of 8th October 1945, nor at the application for planning permission nor any of the contemporaneous correspondence. But this does not matter for those documents could hardly make it more obvious than does the layout plan that the word "uncoloured" was inserted by mistake in the grant.

It is well settled that an obvious mistake in a document can be corrected if the meaning of the document is clear; and this correction can be made by construing the document according to its clearly intended meaning without resorting to rectification: *Wilson v. Wilson* (1) per LORD ST. LEONARDS. Counsel for the local authority has argued that the meaning of the grant of planning permission with the word "uncoloured" struck out is so obscure as to be void for uncertainty. I am afraid that I cannot accept that argument.

I do not think that in this case we ought in the words of SIR GEORGE JESSEL, M.R., in *Re Roberts, Repington v. Roberts-Gawen* (2): "to repose on the easy pillow of saying that the whole is void for uncertainty." In my view it is important to note that in 1945 it was not necessary to have a Board of Trade industrial development certificate, in order to obtain permission to use land for the purpose of building operations. This requirement was introduced for the first time by s. 14 (4) of the Act of 1947. Accordingly I agree with the learned judge that a permission given in 1945 for land "to be used for industrial purposes" ought not to be given such a restricted meaning as it might receive were the permission granted today. I agree with LORD DENNING, M.R., that the grant of 17th October 1945, on its true construction gave what would now be described as outline planning permission for the erection of factories roughly as shown on the layout plan. This was subject to submission by the developer and subsequent approval by the local authority or by the Minister on appeal of particulars of the proposed development. These particulars would include such matters as the size, elevation and the exact location of the proposed factories on the site.

By 1955, all but about 90 of the 250 acres to which I have referred had been developed. This development had taken place without reference to the 1945 grant but on separate new applications for each factory erected. The important question arises whether the 1945 grant is now still available in respect of the 90 acres or whether it has been abandoned. Counsel for the company has argued that the grant of a planning permission is incapable of abandonment. There is no authority on this point. I agree however with the learned judge that there is no reason in principle which such a grant cannot be abandoned. In my view it can be abandoned at any rate by the original grantee to the local authority

(1) (1854), 5 H.L. Cas. 40.

(2) (1881), 19 Ch.D. 520.

which made it. Whether an abandonment would be effective against a subsequent bona fide purchaser for value who purchased the land without notice of abandonment does not arise for decision and I express no opinion on the point.

Some years prior to 1952, a development plan had been approved by the county council which scheduled the 90 acres for use as an open space and for purposes other than the erection of industrial buildings. Thereafter it must have been obvious to all concerned that if a fresh application were made to erect factories on these 90 acres, it would inevitably be refused.

The Town and Country Planning Act 1954, set up a fund of £300,000,000 out of which compensation should be paid to any landowners who were refused permission to develop their land. Section 59 provided, in effect, that if any landowner applied without a Board of Trade industrial development certificate for permission to erect industrial buildings on his land, the planning authority should consider whether, if there had been such a certificate, it would nevertheless have refused permission: if the planning authority was of the opinion that it would have refused such permission, it must notify the landowner to that effect and permission would then be deemed to have been refused for the purpose of the Act.

The company made two applications in 1955 under s. 59 of the Act of 1954, one in respect of 12½ of the 90 acres and the other in respect of the remaining 77½ acres. The applications naturally (having regard to the development plan) were both refused. As a result the company was awarded and paid £178,595 compensation by the Ministry. Counsel for the company concedes that the applications under s. 59 were made by the company with the sole purpose of obtaining compensation. He also concedes that if the 1945 permission was still in force in 1955, the company ought not to have made any application under s. 59 and was not entitled to any compensation. The question is, did the company by making the applications and obtaining the compensation unequivocally elect to treat the 1945 permission as waived or abandoned. One of two courses was open to the company. It had a choice: either (a) to keep the 1945 permission alive, in which case it could not justifiably obtain compensation under the Act of 1954; or (b) to abandon or waive its rights under the 1945 permission in which case it might justifiably obtain compensation under the Act of 1954. The two courses were mutually exclusive for it could not be justifiable to obtain the compensation under the Act of 1954 if the company's permission under the 1945 grant was still alive. Accordingly, in my view by obtaining compensation, it did an act by which it unequivocally waived or abandoned its rights under the 1945 permission. This conclusion accords with the settled principles of the common law (see *Scarf v. Jardine* (1) per LORD BLACKBURN). I wish to make it plain that I am not saying that a landowner who has applied for and obtained planning permission to develop his land for one purpose abandons his right under that permission by making a subsequent successful application to develop his land for another purpose. Being in possession of the two permissions he can justifiably develop his land for one purpose or the other. The first permission is not inconsistent with the second application. This is quite different from the present case. Here the company had an outline planning permission for the erection of industrial buildings. Whilst this permission remained alive, it could not justifiably take steps to obtain compensation under the Act of 1954. The applications which the company made in 1955 were merely steps taken to obtain such compensation, and these steps were bound to be successful. Therefore it must be taken to have abandoned or waived its rights under the 1945 permission.

I doubt whether the actual state of mind of the representatives of the company or the local authority would be material. But even if it were I cannot think that the company would be in any better position. The learned judge was not satisfied that the company intended, or manifested an intention, to abandon the 1945 planning permission. He concluded that in 1955 it had probably forgotten the 1945 planning permission. I do not agree with that conclusion. Only three years before, in 1952, there had been an inquiry into the county council's development plan at which the company was represented by leading and junior counsel. During the hearing the county council acknowledged that the 1945 permission was still in force and that if it revoked it it would be liable to pay compensation to the company. Moreover on each of the applications made by the company in 1955 reference was made to U.L.21, the application on which it succeeded in obtaining the 1945 permission. To my mind it is inconceivable that when the company made its application in 1955 it had forgotten or that the county council thought that it had forgotten the 1945 permission. It would clearly have been dishonest for the company to make the 1955 applications or accept payment of the £178,545 compensation unless it had intended to abandon or waive its rights under the 1945 permission. And everyone concedes that the company is honest and has acted honestly throughout. It follows therefore that the 1945 permission was intentionally abandoned or waived. Counsel for the company argues that the company could not have been so stupid as to have intended to abandon or to waive its rights under the 1945 permission which are said to be worth over £3,000,000 pounds today for the sake of getting a mere £178,545 in 1955. But this argument cannot avail the company even if it were sound, because no one suggests that the company acted dishonestly and the argument therefore merely supports the finding of the learned judge that in 1955 the company had forgotten all about the 1945 permission—a finding which for the reasons indicated I have already rejected. For my part I am not persuaded that it was stupid for the company to take the £178,545 in 1955 and abandon or waive its rights under the 1945 permission. The company is very experienced and successful in land development. Apparently it did not wish to start developing the 90 acres in question until shortly before April 1966 when it took out the present originating summons. I do not think it unlikely that in 1955 it realised that the 90 acres would probably be lying fallow for upwards of ten years. Moreover it may have had some doubts as to the validity of the 1945 permission which on its face contained an obvious mistake. In these circumstances even so small a sum as £178,545 might have been regarded as a bird in the hand well worth having. It should have been fairly obvious in 1955 that if that sum were wisely invested, the capital accretion over the next ten years or so would probably be very large indeed—perhaps three or four times the value of the original investment. In addition there would be the interest. The company graciously concedes that it should repay the bare sum of £178,545 but maintains that providing it does so it may enjoy the rights conferred by the 1945 permission (said today to be worth over £3,000,000) together with the capital accretion and interest on the sum of £178,545 which it received about 14 years ago as compensation for being deprived of the development rights which it now says it has always enjoyed. This seems to me to be blowing hot and cold with a vengeance. Certainly far hotter than the law allows. Accordingly I agree that this appeal should be dismissed.

KARMINSKI, L.J.: I have had the advantage of reading the judgments of LORD DENNING, M.R., and of SALMON, L.J., and I agree that this appeal



must be dismissed. But as its subject-matter may be of some general interest, I desire to add a very few observations of my own.

So far as construction is concerned, I too am of the opinion that the permission granted to the company Slough Estates, Ltd., on 17th October 1945, was what is now called outline planning permission to erect factories as shown generally on the plans submitted. It is clear that the word "uncoloured" was used in error, since it makes nonsense of the layout of the plan submitted. Once this plan is examined, it is clear that what was permitted was the development of a large area of land, irrespective of colour, which was at that time undeveloped.

I also agree that the company abandoned the 1945 planning permission when later it accepted compensation for the loss of development value. It seems to me of little practical importance whether this was an abandonment or a waiver of the permission. Whatever term is used, the company elected to give up its development rights in exchange for a large sum of money paid in cash in 1955 namely £178,545. It may be that if the company had waited for another ten years it would have done much better financially. But the decisive date is 1955, when it elected to accept an ascertained sum, and not to gamble on the possibility of any increase at some future date.

Like SALMON, L.J., I express no opinion on the effect of such abandonment on a subsequent bona fide purchaser for value, who had bought the land without notice of such abandonment. This question does not arise on this appeal.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; Sharpe, Pritchard & Co.*, agents for *Norman T. Berry*, Slough and *R. E. Millard*, Aylesbury.

F.C.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND KARMINSKI, L.JJ., AND GEOFFREY LANE, J.)

April 17, 1969

R. v. JULIEN

Criminal Law—Self-defence—Duty to retreat—Doctrine not applicable to cases of homicide only.

Before a defence of self-defence can be relied on, the defendant must prove that when he was threatened he was prepared to temporise and disengage and perhaps make some physical withdrawal, at any rate to the extent of demonstrating by his actions that he does not wish to fight. This doctrine applies to assault and all other charges as well as to homicide.

APPEAL by Thomas Julien against his conviction at Inner London Quarter Sessions before the deputy chairman of assault occasioning actual bodily harm when he was sentenced to nine months' imprisonment. He appealed on the grounds, *inter alia*: (i) that the deputy chairman's direction to the jury on self-defence was insufficient in that it failed to show that the onus of proof was throughout on the prosecution; and (ii) that the deputy chairman misdirected the jury in telling them that before using force in self-defence, there was an obligation to retreat.

K. M. McHale for the appellant.

C. R. Hilliard for the Crown.

WIDGERY, L.J., delivered the judgment of the court. The appellant Thomas Julien stood his trial at the Inner London Quarter Sessions in September 1968 on an indictment containing two counts. The first alleged that he had assaulted one Delco thereby occasioning him actual bodily harm, and the other that he was in possession of offensive weapons, namely, one bottle and the exhaust-pipe of a motor cycle. Both counts related to an incident which occurred on 23rd June 1968. The appellant was convicted on the assault count (count 1) and acquitted on the second count of possessing offensive weapons. He was sentenced to nine months' imprisonment in respect of the assault; and he now appeals against his conviction by leave of the single judge. [After stating the facts, the learned Lord Justice continued:] The incident in question occurred on a Sunday night, 23rd June 1968, somewhere about 10.0 p.m. On that occasion in a flat in Sutherland Avenue, London, W.9, a party was in progress which was attended by a large number of people; and the evidence of Mr. Delco (the complainant) was that he was a guest at the party, and he was called to the door. At the door, he said, he found the appellant with two other men, and the appellant apparently was anxious to attack him. He said that the appellant got free of the two men who were seeking to restrain him, picked up an empty milk bottle, threw it at Mr. Delco and it struck him on the top of the head. He was knocked down and his head began to bleed, and it was that incident which supported the charge of assault occasioning actual bodily harm. He said he was going for the police and stepped into the street, and as he did so he saw the appellant pick up another bottle; and shortly afterwards he saw the appellant with another milk bottle and a piece of exhaust-pipe in his hand, handling them in an aggressive fashion. It was that incident which gave rise to the charge of possessing offensive weapons.

The medical evidence showed that Mr. Delco had been wounded, though not seriously; and the appellant never sought to dispute that he had thrown the milk bottle which had given rise to that wound. The story told by the defence was that the appellant and his wife had been going along the road in a perfectly peaceful fashion, and as they passed the door of this flat he saw Mr. Delco there, and some kind of altercation developed between them. The appellant said that Mr. Delco armed himself with a chopper and threatened him with it, and, he said, it was this and this alone which prompted him to throw the first milk bottle which, in fact, wounded Mr. Delco. He said that, undismayed by the wound, Mr. Delco continued to threaten him with the chopper, and that he picked up the other milk bottle and the length of motor cycle exhaust-pipe as defensive weapons in order to protect himself against further attack from the chopper. In other words, the appellant admitted the fact of having wounded Mr. Delco, and he admitted the possession of the weapons alleged to have been offensive; but his case was that he was on the defensive throughout and that whatever he did was reasonable self-defence.

A great deal of other evidence was called, and since all the persons concerned were in an excitable condition it may well have been difficult for the jury to reach conclusions on it; and, indeed, it was evidence that the jury had some difficulty with this case because, retiring at 3.42 p.m., they returned into court at 4.58 p.m. (we understand on their own initiative) to say that they could not agree. The deputy chairman sent them out again saying: "... If there is a doubt about it acquit the [appellant] . . .", and the jury, after a further absence of some 29 minutes, returned with the verdicts to which I have referred. Although the evidence may have been difficult to analyse and reconcile, the issue here was clear enough. The appellant, admitting he had caused the wound, the only question

was whether his conduct was justified on principles of self-defence; and likewise on the second count the only issue was whether he was holding these weapons in a defensive way or in an offensive way, and that was the matter on which the jury had to be instructed.

Counsel for the appellant has made three complaints. First of all, he says that the direction on self-defence, which was, of course, the crucial direction in this case, was insufficient. With all respect to the learned deputy chairman, this court is bound to conclude that the direction was not altogether clear. The learned deputy chairman went in some detail into the necessity for some relationship between the violence or force used in defence to that which had been used in offence. He pointed out perfectly fairly that if the appellant had been threatened with a chopper it was not unreasonable for him to use a milk bottle by way of defence. He also pointed out that there was an obligation on the defendant to retreat before using force in self-defence; but he did not further analyse the evidence so as to show the jury how the principles of self-defence should be applied to it, and (what is perhaps more serious) he did not point out to the jury in any clear terms that, although self-defence is constantly referred to as a defence, the onus on that issue rests on the prosecution throughout, and it was their duty to prove that the appellant's acts were not acts of legitimate self-defence. The importance of such a warning in such cases was recently stressed in *R. v. Wheeler* (1).

The second complaint made by counsel for the appellant is that the verdicts were inconsistent. Strictly speaking, as has been demonstrated to us by counsel for the Crown, they could be reconciled, because in the considerable volume of evidence available a witness (or witnesses) can be found who suggested that Mr. Delco did not produce the chopper until after he had been struck by the bottle. Of course, if that was so it would be perfectly sensible to conclude that the appellant was the aggressor in the first part of the incident, but had turned over to the defensive when he picked up the second bottle and the exhaust-pipe. If the jury had looked at it in that way, of course, their verdicts would be quite understandable. One is bound to say that neither of the principals in this matter (the appellant or Mr. Delco) put the matter in that way, and it was never so canvassed by the learned deputy chairman in his summing-up. One is left at least with some slight suspicion on the facts of this case that the jury's conclusion was not a rational conclusion based on some part of the evidence, but something in the nature of a compromise when they found initially that they were unable to agree.

The third point taken by counsel for the appellant is that the learned deputy chairman was wrong in directing the jury that before the appellant could use force in self-defence he was required to retreat. The submission here is that the obligation to retreat before using force in self-defence is an obligation which only arises in homicide cases. As the court understands it, it is submitted that if the injury results in death then the accused cannot set up self-defence except on the basis that he had retreated before he resorted to violence. On the other hand, it is said that where the injury does not result in death (as in the present case) the obligation to retreat does not arise. The sturdy submission is made that an Englishman is not bound to run away when threatened, but can stand his ground and defend himself where he is. In support of this submission no authority is quoted, save that counsel for the appellant has been at considerable length and diligence to look at the textbooks on the subject, and has demonstrated to us that the textbooks in the main do not say that a preliminary retreat is a necessary

(1) [1967] 3 All E.R. 829.

prerequisite to the use of force in self-defence. Equally, it must be said that the textbooks do not state the contrary either; and it is, of course, well known to us all that for very many years it has been common form for judges directing juries where the issue of self-defence is raised in any case (be it a homicide case or not) that the duty to retreat arises. It is not, as we understand it, the law that a person threatened must take to his heels and run in the dramatic way suggested by counsel for the appellant; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and to the extent that that is necessary as a feature of the justification of self-defence, it is true, in our opinion, whether the charge is a homicide charge or something less serious. Accordingly, we reject counsel for the appellant's third submission.

However, the first two submissions have given us considerable food for thought. It may be that neither by itself would justify the setting aside of this conviction, but in combination and when set in the framework of this case as a whole we have concluded after discussion that this verdict is an unsafe verdict and that the conviction must accordingly be quashed. Accordingly, so far as this case is concerned, the appellant is discharged.

Conviction quashed.

Solicitors: Registrar of Criminal Appeals; Solicitor, Metropolitan Police.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND KARMINSKI, L.JJ., AND GEOFFREY LANE, J.)

April 17, 1969

R. v. WUYTS

Criminal Law—Forgery—Possession of forged banknotes—Defence—"Lawful authority or excuse"—Intention to hand over banknotes to police—Banknotes not handed over at first available opportunity—Forgery Act 1913 (3 & 4 Geo. 5 c. 27), s. 8 (1).

On a charge of possession of forged banknotes contrary to s. 8 (1) of the Forgery Act, 1913, possession solely with the intention of handing the notes over to the police is a "lawful authority or excuse" within the meaning of the subsection, and, accordingly, a valid defence. A defendant is not necessarily deprived of this defence by his failure to hand the notes over to the police at the first available opportunity.

APPEAL by Nicholas Charles Wuyts against his conviction at the Central Criminal Court on an indictment charging him with unlawful possession of two forged £5 Bank of England notes contrary to s. 8 (1) of the Forgery Act 1913, when he was sentenced to eight months' imprisonment for that offence to run concurrently with a term of four months' imprisonment imposed on a conviction on an earlier count of the indictment of uttering a forged £5 Bank of England note.

R. W. P. H. Hay for the appellant.
Lord Stormont for the Crown.

WIDGERY, L.J., delivered the judgment of the court: The appellant was convicted at the Central Criminal Court on 22nd January 1969 on two counts under the Forgery Act 1913. The first was for uttering a forged banknote (count 1) and the second (which was in fact count 3) was in respect of possession of forged banknotes knowing them to be forged, contrary to s. 8 (1) of the Act. He was sentenced to four months' imprisonment on count 1 and eight months' imprisonment concurrent on count 3. He now appeals against his conviction on count 3 only, by certificate of the trial judge.

The circumstances of this case can be put quite briefly. On 18th May 1968 the appellant, driving a motor car, went to a garage, ordered some petrol and tendered a forged £5 note in payment. The pump-attendant noticed the forgery and refused to accept the note, whereupon the appellant found other genuine money to pay for the petrol. In due course the appellant went to the police and surrendered the £5 note in question. At the trial he contended that when he had tendered the note he was unaware that it was a forgery, but the jury clearly disbelieved him on that question and, accordingly, convicted him on count 1, in respect of which there is no appeal. What happened after that is somewhat obscure, because it depended entirely on the appellant's evidence, and he (according to the evidence of the police) had contradicted himself more than once. However, so far as his evidence at the trial was concerned, it was to the effect that some 13 days later, namely, on 31st May 1968, when working as a mini-cab driver, he had taken a fare to Stansted from London late at night and had been paid by two further forged £5 notes. The fare was £6, and he said that he gave four genuine £1 notes by way of change. He said that he did not notice the forgery initially, but stopped on his way back to London and looked at these notes, and then found that they were forgeries. He made some attempt, he said, to find the man who had passed them to him, and on his return to the headquarters of the mini-cab organisation for whom he was working he complained to others there that he had been passed two forged £5 notes. He said that, having finished work that night, he went to the flat of a friend of his to sleep, and that the two notes in question which he had received at Stansted were left in the car in an atlas under the front seat. He said in the course of the trial that it was his intention to surrender these notes to the police, and his explanation of not having done so was that he had not had time; he had either been working or sleeping throughout 31st May. On 1st June—and again before the appellant had done anything in regard to these two £5 notes—the owners of the car, who had hired it to him, saw it in the street and took it away; and that meant that the appellant had no further access to these notes from that time. He sent his friend (Miss Pearce) to collect his belongings from the car, but the hire company was not prepared to surrender them; and in fact, as the court understands it, itself, handed these two clearly forged notes over to the police.

On count 3 a question arose at an early stage of the trial as to the true construction of s. 8, which I must now read:

"(1) Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, without lawful authority or excuse, the proof whereof shall lie on the accused, purchases or receives from any person, or has in his custody or possession, a forged bank note, knowing the same to be forged."

The learned trial judge at an early stage requested the assistance of counsel as to the proper construction of the section, because the judge took the view that if it were proved by the prosecution that the notes were forged and that they were knowingly in the possession of the accused, then he having no lawful

authority to possess them (in the sense of being a public officer authorised to take them) had committed an offence. It was suggested that the offence constituted by s. 8 (1) was an absolute offence, in the sense that if possession and knowledge of the forgery were proved then an offence had been committed.

After argument the learned trial judge adhered to his view, but he went a little further, and his ruling to the jury is, I think, best expressed by looking at the transcript. The passage I am about to read was delivered in the presence of the jury prior to the beginning of the summing-up. The learned judge said:

"The direction that I propose to give you is that if you are satisfied that the [appellant] had possession of the two forged £5 notes, if he knew they were forged—because it is not disputed that they were forged—if he knew that they were forged and he had possession of them, that is the offence and the correct verdict would be a verdict of guilty of that. Further, if that is not correct and it is open to him to prove that when he was found to be in possession of them, he had a lawful authority or excuse for that possession, then I propose to rule—and it is my responsibility; I shall be the one to get into trouble, not you, if I am wrong about this—that there is no evidence on which any jury, properly directed, could find that he had proved that on a balance of probabilities."

It is right to say that a consideration of the transcript as a whole makes it abundantly clear that, although the learned judge was recognising as a possibility that it might be a lawful excuse for the appellant to show that he had retained possession only for the purpose of handing the forgeries over to the police, yet in his view that submission was not open to the appellant in this case, because on his own admission he had not handed over the notes at the first available opportunity. The appellant was specifically asked by the learned judge whether or not he had an opportunity of handing in these notes on his way back from Stansted on the occasion when he received them, and the appellant said that he had. The learned judge took the view that, even if it were right (which he obviously doubted) that possession with intent to hand over to the police might constitute lawful excuse, he took the view that that excuse was not open in this case because the first available opportunity of handing over to the police had not been taken.

In the view of this court, the construction put on the section by the learned judge was too narrow. The court does not propose to attempt anything in the nature of a definition of the phrase "lawful authority or excuse"; but the court recognises that the passing of forged banknotes was made a felony by this Act, and that it is at common law the duty of any citizen to assist the police in the prosecution of a felony. Accordingly, it seems to us that if an accused person in the position of the appellant is able to prove on a balance of probabilities that, although in possession of notes which he knew to be forged, he had retained possession of them solely in order to place them before the police authorities so that the previous possessors of the notes might be prosecuted, in our judgment, if that is shown on a balance of probabilities, that amounts to a lawful excuse.

Counsel for the Crown has contended that to take such a view would, in fact, open the door to allowing an accused person to plead any *reasonable* excuse. But the court does not take that view. The reason why the excuse to which I have referred is, in our judgment, a lawful excuse is because it is an excuse which is wholly consistent with the common law; it is wholly consistent with the duty of the citizen to assist in the capture and prosecution of a felon. The

excuse is "lawful" in the strict literal sense of that word. Accordingly, in our judgment, when the appellant in the course of the trial gave evidence that he had retained the two notes in order to hand them over to the police, the learned judge should have left it to the jury to decide whether on a balance of probabilities they were satisfied that that was his sole intention. The learned judge was wrong in anchoring the case, as it were, to the question of whether he had surrendered the notes at the first available opportunity. Of course, a person in possession of forged notes who wishes to be believed when he says he retains them only for the purpose of assisting the police is well advised to hand them over to the police at the first opportunity, and if he fails to do so he may find that those who have to consider his position later will find it difficult to believe that was his sole intent. But it is a matter of degree; and on the footing that these notes were obtained by the appellant as late as the early hours of the morning of 31st May, and on the further footing that he had no opportunity of handing them over to the police after the car had been re-taken on 1st June, there was, in our judgment, a clear issue proper to be left to the jury on which they should have decided whether they were satisfied on a balance of probabilities that his sole purpose in retaining possession was to hand them over to the proper authorities. That issue was not left to the jury, and there was, in our judgment, a mis-trial accordingly.

The question then arises, of course, whether we ought to apply the proviso under s. 2 (1) of the Criminal Appeal Act 1968 and nevertheless uphold the conviction. Counsel for the Crown has urged with force that this was a case in which the appellant had attacked the evidence for the prosecution at every point, had raised allegations against the police of a serious character (all of which were clearly disbelieved by the jury), and, indeed, according to the police, had made a statement that he had possessed these notes, not for some 24 hours, but for 15 days before the car was taken from him. Those matters are suggested as being proper considerations for the application of the proviso in this case. However, it is right to say that counsel for the Crown, with his customary candour, has reminded us that it is a very unusual thing to apply the proviso when an issue appropriate to the decision of the jury has never been left to them at all.

We have considered this matter, and are of opinion that the proviso should not be applied. Accordingly, there being, as I say, a misdirection to the jury, the conviction on count 3 must be set aside with its attendant sentence.

Appeal allowed.

Solicitors: *Registrar of Criminal Appeals; Freshfields.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(PARKER, C.J., MELFORD STEVENSON AND WILLIS, JJ.)

April 16, 17, 1969

I. & N. WESTON, LTD. v. METROPOLITAN POLICE COMMISSIONER

*Gaming—Kittyscoop—Variant of roulette—Equality of chances for all players—**Betting, Gaming and Lotteries Act 1963 (c. 2), s. 32 (1) (a), (b).*

The defendants owned and managed a bona fide social club, the main activity of which was the playing of bingo. In January 1968 they introduced the game of kittyscoop as an amenity for members. The game was a variant of roulette, played by means of an ordinary roulette wheel on which six numbers in three pairs had been labelled "Kittyscoop". The zero on the wheel was effectively eliminated as a factor in the game. The odds offered against any of the six kittyscoop numbers winning was four to one. The equal odds were five to one, and accordingly the game operated in favour of the kittyscoop. Any member who wished to play was required to obtain a numbered ticket which entitled him to play for one session and he was charged a fee of £1 for the session. A float was provided by the club as a loan to the players at the commencement of each session. All moneys bid as stakes were paid into the kittyscoop and all winnings were paid out of the kittyscoop. At the end of a session, if any surplus remained, the club took from the pool sufficient money to reimburse itself for loans and to pay session fees owed by the players; any balance was distributed between the ticket holders, and, if there was a deficiency, the ticket holders were bound to make this up in equal proportions. Justices found the defendants guilty of being concerned in the management and organisation of unlawful gaming contrary to s. 32 (4) of the Betting, Gaming and Lotteries Act, 1963, but the defendants appealed to quarter sessions who allowed the appeal. On an appeal to the High Court by the prosecutor,

HELD: that the defendants had not discharged the burden of proof which, under s. 32 (1) (a) of the Betting, Gaming and Lotteries Act, 1963, was on them to show that the game was so conducted that the chances therein were equally favourable to all the players; the appeal must, therefore, be allowed and the conviction restored.

A CASE STATED by the quarter sessions for the Middlesex area of Greater London.

On 11th June 1968, the defendants were convicted by a court of summary jurisdiction sitting at Uxbridge magistrates' court in that they, on 2nd February 1968, at the Savoy Bingo and Social Club, High Street, Uxbridge, were concerned in the management and organisation of unlawful gaming contrary to s. 32 (4) of the Betting, Gaming and Lotteries Act 1963. They appealed to quarter sessions, where on Sept. 6 1968, the following facts were found.

The defendants owned and managed the Savoy Bingo and Social Club at High Street, Uxbridge, a bona fide club which was properly conducted. The main activity carried on at the club was the playing of bingo. On 4th January 1968, the game of kittyscoop was introduced as an amenity for members, the game being available for play by members between sessions of bingo. Kittyscoop was a variant of roulette, played by means of an ordinary roulette wheel on which six numbers in three pairs had been labelled "Kittyscoop". The zero on the wheel was effectively eliminated as a factor in the game. The odds operated in favour of the kittyscoop, for example, odds of four to one were offered against any of the six kittyscoop numbers winning whereas the equal odds were five to one. The rules of kittyscoop which were set out on the back of the ticket issued to each player. They provided, *inter alia*: any member who wished to play was required to obtain a numbered ticket which entitled him to play in the one session to which it applied. The ticket was issued to the member before he commenced play and his membership number was endorsed

on the counterfoil thereof; a fixed sessions fee of £1 was payable by each player to the club; a float was provided by the club as a loan to the players at the commencement of each session, each of whom was required to repay to the club at or after the conclusion of the session an equal proportion of the float so provided. All moneys laid as stakes were required to be paid into the kittyscoop. All winnings were paid out of the kittyscoop. Any surplus remaining at the end of a session being used first in discharge to the club of each player's liability to repay his proportion of the float provided by the club, secondly in payment to the club of each player's fixed session charge, and thirdly by distribution of the balance, if any, remaining to the players equally by way of dividend; in the event of there being insufficient moneys in the kittyscoop at the end of a session to repay the float and pay the sessions fee each player undertook to pay to the club on demand an equal proportion of the sum required.

The club management kept record cards for each member who played kittyscoop. After each session the staff ascertained the amount due to the players by way of dividend, or the amount owed by the players to the club; the appropriate credit or debit entry being later entered in the players' record cards. Members were entitled to see their record cards in order to ascertain the state of their accounts at any time and to demand any credit balance due. No member was allowed to incur a debit balance in excess of £10. The relevant rules of the club were properly observed both by the club and the players, the record cards were properly kept, and dividend notices posted regularly on the club notice board as required by rule 10.

On 2nd day of February 1968, kittyscoop was being played at the club at 9.30 p.m. About 15 persons were present at the gaming. At the end of the session the sum of £90 16s. remained in the kittyscoop. From that sum there was deducted: £35 being the amount advanced by the club at the beginning of the session as a float; £40 being the fixed sessions fee of £1 in respect of 40 players. The remainder, i.e. £15 16s. was divided by 40 and the sum of 7s. 11d. declared to be the dividend due to each player for that session. This sum was entered on the appropriate dividend sheet. (i) Between the 4th day of January 1968, and the 2nd day of February 1968, the club had not sought to enforce the provisions of r. 9 by recovery of such moneys as might then be owed by players to the club, however, the justices accepted Mr. Weston's evidence on behalf of the club that during this short period, members' kittyscoop accounts had, on the whole, balanced out.

It was contended on behalf of the prosecutor that: The kittyscoop was itself a player and the management had an interest in the kittyscoop out of which the float was repaid and the sessions fee paid. As the odds favoured the kittyscoop the chances in the game were not equally favourable to all the players. This was a breach of s. 32 (1) (a) of the Act. As the sessions fee was paid out of the kittyscoop it was paid out of the losses made by the various players. This was a breach of s. 32 (1) (b) of the Act. As no attempt had been made to recover in cash any moneys owed by any player to the club under the rules of kittyscoop the rules did not reflect the realities of the situation. The game of kittyscoop was a device to enable the management to obtain the sessions fee from which the respondents obtained their profit. The defendants had failed to discharge the onus of proof placed on them by s. 32 (2) (a) of the Act.

It was contended on behalf of the defendants that: It had been shown on the evidence that the club was not at risk either as to the repayment of the float or the payment of the fixed sessions fee, in that neither depended on the contingency of the game itself, and that therefore the club was not a player within

the meaning of the Act. That although by virtue of s. 36 of the Act, the club was entitled to make a fixed charge payable by members taking part in the gaming provided it was determined before the gaming began, the manner in which the same might be recovered was not governed by the Act. The rules of kittyscoop on the facts of this case, both as to their wording and their actual operation, realistically and effectively provided for repayment by the players of the float and payment of the sessions fee irrespective of the results of any particular game, and that accordingly the defendants had discharged the onus of proof placed on them by s. 32 (2) (a) of the Act.

The court was of the opinion that although circumstances might exist where the non-observance of rules such as those before them could result in a finding that the club was taking part in unlawful gaming, on the particular facts before them, they were satisfied that this was not so, that the defendants' contentions on those facts were well founded, and that they had discharged the onus of proof required by the Act. They accordingly decided that the appeal should be allowed. The prosecutor appealed to the Divisional Court.

J. H. Buzzard and W. N. Denison for the appellant.

J. C. G. Burge, Q.C., and R. M. G. Simpson for the respondents.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of the court of quarter sessions for the Middlesex area of Greater London who allowed an appeal by *I. & N. Weston, Ltd.*, the respondents, from their conviction at a court of summary jurisdiction sitting at Uxbridge for that they had been concerned in the management and organisation of unlawful gaming contrary to s. 32 (4) of the Betting, Gaming and Lotteries Act 1963.

The game in question, and I must refer to it in detail in a moment, was a variant of the game roulette, and therefore was a game which inherently carried odds which were not equally favourable to all the players. However, what was said in the present case was that the gaming was, to use the words of s. 32 (1) (a) (ii) of the Act, so conducted that the chances therein were equally favourable to all the players. That being the condition which it is said was fulfilled in the present case, the burden rested on the managers under sub-s. (2), to prove that the gaming was conducted in accordance with the conditions set out in sub-s. (1).

Finally, I should add that the managers in the present case were managers of a bona fide club to which s. 36 of the Act applied, and accordingly provided, as undoubtedly was the case here, that a sum was determined before the gaming began as a condition of taking part in the gaming, then the condition in s. 32 (1) (c) was deemed to be complied with.

The respondents run what is known as the Savoy Bingo and Social Club at Uxbridge. They provided as an amenity for members, between sessions of bingo, the playing of what was called kittyscoop, a variant, as I have said, of roulette. One thing is perfectly clear, that one of the variants was that the zero was completely eliminated. However, three pairs of two numbers, were labelled with this word "Kittyscoop", rather like in some previous cases numbers have been labelled "Players Pool". Though the zero was eliminated, the odds operated in favour of this kittyscoop. Odds of four to one were offered against any of the six kittyscoop numbers winning, whereas the odds in respect of the other numbers were five to one.

The club had printed rules of which the more important are as follows:

"Any member wishing to play must obtain a numbered ticket which will entitle him to play in the one session to which it applies."

I might add here that a session was from 7.0 p.m. to 2.0 a.m. although of course the playing did not last all the time because it was only taking place in between sessions of bingo.

Returning to the rules:

"3. The ticket will be issued to the member before he commences play and the member's membership number must be endorsed on the counterfoil thereof . . .

"6. A fixed charge shall be payable to the Club such charge to be until further notice in the sum of £1.

"7. A float is provided by the Club at the commencement of each session by way of loan to the players, each of whom shall repay to the Club at or after the conclusion of the session an equal proportion of the loan so provided.

"8. All monies laid as stakes shall be paid into the Kittyscoop. Neither the Club nor any persons concerned in the management of the gaming shall be players. [That is one of the matters that has to be decided.] All winnings shall be paid out of the Kittyscoop, any surplus at the end of the session being used firstly in discharge to the Club of each player's liability to repay his proportion of the float by the Club, secondly in payment to the Club of each player's fixed session charge and thirdly by distribution of the balance, if any, remaining to the players equally by way of dividend.

"9. Should there be insufficient monies in the Kittyscoop at the close of the session to enable the Club to be repaid its float and to be paid the fixed session charge in full, each player undertakes to pay to the Club on demand an equal proportion of that sum required."

On 2nd February 1968 police officers entered the club, and it was found that at the time they entered, there were some 15 persons who were described as "being present" at the gaming; I do not know that it matters, but I rather assume from that they were the people who were taking part in the gaming at the time. At the end of the session, whenever that was, it was found that a sum of £90 16s. remained in the kittyscoop, and that was distributed in this way: £35, which was the amount of the float advanced by the club was repaid to the club; £40 was also paid to the club being the fixed session fee of £1 in respect of 40 players—pausing there, therefore, apart from the 15 who were found present at the gaming, some further 25 had from time to time during the session played at the game. That left a sum in the pool of £15 16s., and this was divided by the 40 people who had played or been entitled to play, the sum of 7s. 11d. accordingly being the dividend due to each player.

Finally, merely to get it out of the way, it was said at quarter sessions that the rules were not complied with, in particular that r. 9 was really a sham and that any deficiency in the float or in the amount available to pay the session charges was just not collected from the players. As I will show in a moment, if that were the position, this would come within *Director of Public Prosecutions v. Essoldo Circuit (Control), Ltd.* (1). But quarter sessions having heard the evidence, were satisfied that the rules were obeyed, and that where the collection of a deficiency had not taken place, it was because the kittyscoop accounts of the members on the whole, as they put it, balanced out. Accordingly, that question of fact being out of the way, the question remained whether the game as played strictly in accordance with the rules offended against s. 32. The justices came to the conclusion that it did not, and they word their opinion in this way:

"The court was of the opinion that although circumstances might exist where the non-observance of rules such as those before us could result in a

(1) 129 J.P. 592; [1965] 3 All E.R. 421; [1966] 1 Q.B. 799.

finding that the club was taking part in unlawful gaming, on the particular facts before us, we were satisfied that this was not so, that the [respondents'] contentions on those facts were well founded, and that they had discharged the onus of proof required by the said Act. We accordingly decided that their appeal should be allowed."

The question for the court is whether the decision to allow the appeal was correct in law.

This is yet another case of variants being introduced into the game of roulette in an attempt to ensure that the game can be played legally under the Act. In particular in the present case the variant takes the form of trying to get round, if I may use the expression, the decision of this court in the *Essoldo* case (1). In that case six numbers were labelled "Players Pool", the odds again were not equal, odds of four to one being paid in respect of the players pool and five to one in respect of the numbers; as in the present case the club advanced a float, but with this important distinction that the club merely made a float available whereas in the present case the float has been stated to be a loan to the actual players. Again as in this case at the end of the session there was paid out of the pool first the float, secondly the service charge for each player, which was again £1 as in this case, finally, and this is unlike this case, 1d. to each player, and when that had been done the balance, if any, was divided as dividends to the player. In other words in the *Essoldo* case (1) a dividend of £1 and 1d. was, as it were, guaranteed. The court in the *Essoldo* case (1) held that the club, at any rate in the early stages, was at risk, and therefore was a player—at risk if the amount in the pool at any time was less than the float, since it would have had itself to bear the deficiency. Accordingly since the chances in the game were not equally favourable to each player including the club, the game was held to be unlawful.

In the present case the respondents have sought to make the same type of game legal by providing, as I have said, that the float should be a loan to the players, and also by r. 9 that in the event of any deficiency each player who has taken part in the gaming during the session, and I would add in parenthesis, as it seems to me, any person who has obtained a numbered ticket and counterfoil and who has for one reason or another not taken part at all, would be liable to make up his proportion of the deficiency in the float, and also any deficiency in the session fee. It was in those circumstances urged before the quarter sessions and before this court that the club in the present case in no sense could be said to be a player, in that the club was not at the risk of any loss due to there being a deficiency in the pool.

For my part I am by no means clear that the club in the present case was not properly called a player within the definition of s. 55 of the Act. The reality of the position, as it seems to me, is that the gaming was managed in such a way as to enable the club to collect, as it were, at source, the only part of the stakes which could be profit to itself, namely the £1 session fee. True it could collect any deficiency there was from individual players afterwards, but clearly the odds here were weighted in favour of the pool for the very good reason of ensuring as far as possible that the club got at source the return of its loan and the payment of the service charges, thus avoiding the trouble and the risk of not being able to collect from the individual players. Further, it stands to reason that if a £1 session fee was demanded in advance, there would be no doubt less people to take part in the gaming; and this method of operation enabled the club to

(1) 129 J.P. 592; [1965] 3 All E.R. 421; [1966] 1 Q.B. 799.

get a greater number of session fees and to ensure that they were paid out of the pool, without the necessity of trying to collect afterwards from the other people.

However, having said that, I prefer to base my decision in the present case on what I think is the better view here, that although it is arguable that the club was a player, the player here was the collective body, call it the syndicate, of all those who had become liable, either by playing or more accurately by getting their numbered ticket to take part in the gaming. On that view, a person who obtained a ticket and did not himself play in the sense of doing any staking or a person entitled to play who at any spin of the wheel abstains, is a member nevertheless of this syndicate, and therefore taking part as a player, and clearly at odds which are more favourable than those available to the players who are actually staking of which he is not one. Equally, as it seems to me, if he does take part in the stakings, the odds are not equal as between himself and the other members of the syndicate, four to one and five to one. Accordingly, as it seems to me when one looks at it in this way, the true view here is as a matter of law that the game was not conducted, or at any rate the managers have not proved, the burden being on them, that the game was so conducted, to use the words of the section, that the chances therein were equally favourable to all the players.

Counsel for the respondents has, as no doubt happened before the justices, strongly urged on us the decision of this court in *Crickitt v. Martin* (1). The facts of that case bear a striking similarity to the facts of this case, and yet this court upheld an acquittal by the justices. No doubt this was a case which did influence quarter sessions in the present case. But having said that, it seems to me that no comfort can be derived by counsel from that case. It is to be observed in the first instance that it occurred at a time between the decision of this court in *Crickitt v. Kursaal Casino, Ltd.* (No. 2) and the decision of the House of Lords in that case (2), a decision which reversed the decision of this court. Secondly it appears from the judgment of WIDGERY, J., that the sole issue in that case was really whether the non-compliance with the rules which had occurred in certain instances was such as to entitle the court to say that the rules were in effect a sham. There again there was provision for collecting from the players each player's proportion of the deficiency, to put it quite generally, in the pool, and that in some cases had not been done. But the justices in that case had come to the conclusion that there was reason for the non-collection, as indeed happened in the present case, and that the rules were by no means a sham. This court felt that it was impossible to say on the facts that the decision of the justices was a perverse decision; accordingly they upheld the decision of the justices.

It is quite true that that case apparently proceeded, according to the judgment, on the basis that if the game had been conducted in accordance with the rules, the rules being very similar, if not identical, to those in the present case, no offence was committed; that assumption of course, was only an assumption for the purpose of that case, and counsel for the appellant is perfectly entitled to argue, as he has done, that although that assumption may have been made in that case, the true view, particularly in the light of the recent decisions of the House of Lords, is that the gaming, even conducted in accordance with the rules, was not lawful gaming.

Finally, counsel for the appellant has a further point, which is that here there was a failure to comply with the condition, not merely in s. 32 (1) (a), but in s. 32 (1) (b), which provides as a condition that no money or money's worth which any

(1) (1967), *The Times*, 12th July.

(2) [1968] 1 All E.R. 139; *revisag.*, [1967] 3 All E.R. 360.

of the players puts down as stakes or pays by way of losses or exchanges for tokens used in playing the game is disposed of otherwise than by payment to a player as winnings. What he says here is that though it may sound very technical, in fact all the money in the pool representing stakes was disposed of otherwise than by payment to a player, because the £1 was not paid out to the player but was £1 paid out or retained by the club, the managers.

The point is somewhat technical in the sense that it is just the same as if the £1 were paid out to each person entitled to play and he then paid the £1 over to the club. But counsel for the appellant says that this is really a position similar to that in *Victoria Sporting Club, Ltd. v. Hannan* (1). That was the well-known case concerning gaming with marker chips in which the marker chips representing the difference in the odds could be cashed or could be exchanged for gaming chips, but members were invited to surrender them to the management. In that case three of their Lordships held that the gaming there was illegal because s. 32 (1) (b) was not complied with. LORD REID said this:

"But what the club must not do is to appropriate any part of that money [that is the money in the pool or the money's worth] as its own. And that is what the club does when the member surrenders chips which he has won. It can make no difference whether the surrendered chips are marker chips or gaming chips because, if the game has been played at the lawful odds, the marker chips which the member receives represent money just as much as do the gaming chips. If, having received his winnings in cash, the member chooses to make a donation to the club, that is his affair. But an offence is committed if he surrenders chips as a donation to the club."

By analogy counsel for the appellant urges here that the retention of the £1, the paying over the £1 to the club before any dividend was paid to the player, offended against s. 32 (1) (b). I can understand the force of the argument of counsel for the appellant, but I for my part have very great doubt whether it applies in any case other than one in which the player, the banker, the holder of the pool, is the club itself. That was the position in the *Victoria Sporting Club* case (1), but on the basis that I feel this case should be decided, namely on the basis that the holder of the pool is the syndicate of players, it seems to me that a different situation may well arise. It seems to me that by the effect of these rules, each player is giving authority to the club as the managers, in no other capacity, to pay out of his winnings the £1 service charge. On that basis, it seems to me that there is no offence by reason of a non-compliance with s. 32 (1) (b).

For the reasons I have endeavoured to state shortly in this case I have come to the conclusion that quarter sessions came to a wrong decision in law, and I would send the case back to quarter sessions with a direction to convict.

MELFORD STEVENSON, J.: I agree. I feel no doubt that the character of a player is acquired as soon as a numbered ticket is obtained in the circumstances that are set out in the case, even if the holder of that ticket thereafter takes no part in the game and stakes nothing. Such a person continues to enjoy odds more favourable than those given to the other players, and that makes the conclusion that an offence under s. 32 (1) (a) (i) has been committed in my view inevitable.

WILLIS, J.: I agree with both judgments.

Appeal allowed.

Solicitors: Solicitor, Metropolitan Police; Saunders, Sobell, Leigh & Dobin.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON AND FENTON ATKINSON, L.JJ. AND MILMO, J.)

December 13, 1968

R. v. WORSSELL AND OTHERS

Dangerous Drugs—Unauthorised possession—Car stopped by police—Defendant passenger in car—Tube found under dashboard—Droplets of heroin discernable microscopically only and not to naked eye—Droplets impossible to measure or pour out—Dangerous Drugs (No. 2) Regulations 1964 (S.I. 1964 No. 1811), reg. 3.

A car in which the appellant was a passenger was stopped by the police, and under the dashboard were found a hypodermic syringe and a small tube which contained a few droplets of heroin that were discernible microscopically only and not to the naked eye and impossible to measure or pour out. The appellant, when told that other passengers in the car had admitted taking drugs, replied: "You'll have to go on what they say. I had a fix, but I'm not dropping them." The appellant was charged with possessing dangerous drugs, contrary to reg. 3 of the Dangerous Drugs (No. 2) Regulations, 1964. The prosecution presented their case on the basis that the appellant was in possession of the drug at the time when the police discovered the tube under the dashboard.

HELD: as the tube was in reality empty it was impossible to say that there was any evidence that it contained a drug at the time when the police discovered it, and as the case for the prosecution had been based on possession by the appellant at that time, the conviction must be quashed; if the case had been based on possession by the appellant at some time prior to arrest, his statement, plus the presence of the tube which had contained the drug, would have been very strong evidence against him.

APPEAL by Barrie Louis Worsell against his conviction at North East London Quarter Sessions of being in possession of a dangerous drug contrary to reg. 3 of the Dangerous Drugs (No. 2) Regulations 1964.

P. H. Counsell for the appellant.

J. B. R. Hazan for the Crown.

SALMON, L.J., delivered this judgment of the court: On 28th March 1968 at the North East London Quarter Sessions, the appellant was convicted of possessing a dangerous drug and he was subsequently put on probation for three years for that offence. He now appeals with the leave of the court against conviction.

In the afternoon of 3rd November 1967 police officers stopped a motor car in which the appellant and his two co-defendants were driving. One of these co-defendants was the owner and driver of the car. The appellant and the other co-defendant were passengers. Under the dashboard there was found a hypodermic syringe and a small tube. There is no doubt that the tube had at one time contained heroin. The real question that arose on the appeal is whether there was any evidence on which the jury could find that it contained heroin at the moment when the car was stopped by the police officers. The police officers gave evidence that when the appellant was told that his co-defendants had admitted taking drugs, he replied: "You'll have to go on what they say. I had a fix, but I'm not dropping them."

Count 1 of the indictment was amended. The particulars of the offence in their original form stated that the accused had in their possession "a certain drug, to wit, a quantity of diamorphine [which is heroin] without being authorised to be in possession of the same". Those particulars were amended in that for the words "a quantity of diamorphine" there was substituted "a few droplets of diamorphine". The appeal does not raise any question whether or not the appellant was in possession of the tube. It has been conducted on the

basis that, if the tube contained diamorphine, the appellant was in possession of it. Leave to appeal was not given on any question arising on possession.

According to the evidence, the tube appeared to be entirely empty. There was nothing in the tube that was visible to the human eye. The scientist who was called on behalf of the Crown stated that under the microscope it was possible to discern a very few, small droplets which were impossible to measure and impossible to pour out. It is quite plain that the learned deputy chairman's view was that it was impossible to say that this tube contained heroin in any real sense of the word. He nevertheless refused to stop the case and allowed it to go to the jury. He did so, it is fairly plain, because he felt that if he were wrong his finding could not be challenged and therefore he considered it was best to allow the case to go to the jury because the view which he took could be tested should the jury convict. He delivered a very careful and accurate summing-up and no sort of criticism has been or could be made of it. The sole question is, was there any evidence on which a jury could come to the conclusion that the tube found under the dashboard contained a drug at the moment when the police discovered it.

Being in possession of a dangerous drug without authority is an absolute offence according to the recent decision of the House of Lords in *Warner v. Metropolitan Police Comr.* (1). The reason no doubt is that if anyone is in possession of a drug there is the risk, if not indeed the probability, that he may be going to take the drug or to peddle it, and taking or peddling heroin constitutes a very grave social evil. But before the offence can be committed it is necessary to show that the accused is in truth in possession of a drug. This court has come to the clear conclusion that inasmuch as this tube was in reality empty (that is, the droplets which were in it were invisible to the human eye and could only be discerned under a microscope and could not be measured or poured out) it is impossible to hold that there was any evidence that it contained a drug. Whatever it contained, obviously it could not be used and could not be sold. There was nothing in reality in the tube.

Before parting with the case, this court would like to make it plain that if this prosecution had been run in a different way from that in which it was run at the trial, there would have been no real defence to it. Learned counsel now appearing for the Crown was not present at the trial. The appellant had said he had had "a fix" earlier on and it seems perfectly plain that what he was admitting was that he had had "a fix" out of the heroin that had been in the tube. The fact that the tube was there in the car coupled with his admission makes it plain that at an earlier stage he had been in possession of a drug. This of course is on the assumption that he was in possession of the tube and as to that no question arose on this appeal. It is a great pity that the indictment was amended and a pity that the case for the Crown was not that the appellant had been, at some time prior to the moment when the police arrested him, in possession of a drug. His statement, as already indicated, plus the presence of the tube which had contained the drug, would have been conclusive evidence against him. Unfortunately, however, the case was run wholly on the basis that he was in possession of the drug in the tube at the moment of his arrest. There was no evidence on which the jury could find that at that moment there was in reality any drug in the tube.

Accordingly, on that narrow ground, this appeal must be allowed.

Appeal allowed.

Solicitors: *Registrar of Criminal Appeals; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON AND PHILLIMORE, L.J.J. AND LAWTON, J.)

January 24, 1969

R. v. GRAHAM

Dangerous Drugs—Unauthorised possession—Small particles of cannabis capable of being weighed and measured—Dangerous Drugs (No. 2) Regulations 1964 (S.I. 1964 No. 1811), reg. 3.

The appellant was in possession of clothes in which were found small scrapings of cannabis capable of being weighed and measured.

HELD: as the cannabis found was capable of being weighed and measured, as a matter of law there was possession of cannabis by the appellant which would justify his conviction of being in possession of the drug contrary to reg. 3 of the Dangerous Drugs (No. 2) Regulations 1964.

R. v. Worsell, p. 503, ante, distinguished.

APPEAL by Christopher Bruce Graham against his conviction at Oxford City Quarter Sessions (Deputy recorder: T. R. FitzWalter Butler, Esq.) of being in possession of a dangerous drug.

H. K. Woolf for the appellant.

S. Tumim for the Crown.

FENTON ATKINSON, L.J., delivered this judgment of the court: In November 1968 at Oxford City Quarter Sessions before the deputy recorder the appellant, who was then aged 20, was convicted of being in possession of a drug, namely cannabis resin, on 7th August 1968 and he was sentenced to three months' detention. He was by virtue of this offence in breach of an earlier probation order for possessing cannabis and harbouring an absconder and he was sentenced to three months' detention concurrent in respect of those original offences. He did not at first intend to appeal, but he was no doubt encouraged to do so by seeing or having brought to his notice the report in a newspaper of R. v. Worsell (1).

On 7th August 1968, the police raided a flat in Oxford where he was living with a young woman. They found some cannabis in the flat, but he was not charged in respect of that. However, on the same day the police took some scrapings from the pockets of the clothing which he was wearing. When he was asked what he would do if those scrapings were found to contain cannabis he said: "I will plead guilty, but I do not think you will find anything. If you do, that is my fault." In fact on analysis traces of cannabis were found in the scrapings from three of his pockets—one from his trousers and two from his jacket. In each case the quantities were very small, but the scientific officer found that the quantity was capable of being weighed and measured. This case being tried before R. v. Worsell (1), no point was made by the defence that the quantities found were so minimal as in truth to amount to nothing. The case was conducted on the basis that these were very small amounts of cannabis, and, that being so, it could well be that the appellant did not know it was there and he was not truly in possession.

The appellant's case was that he did not know there was cannabis in his pockets. He had been convicted of possessing cannabis in July 1967. He said there might still have been traces left over from that time and he said that both the trousers and the jacket had on occasions been borrowed by his girl friend and another friend called Chamberlain, each of whom smoked cannabis and might be

(1) Ante, p. 503; [1969] 2 All E.R. 1183.

responsible for the traces found. There was much discussion at the trial about the trousers in question, because the trousers the girl had borrowed were apparently white, but the police officers were quite clear that the ones from which the scrapings were taken were blue. That line of defence was fully investigated at the trial, there was a perfectly fair summing-up, and the jury convicted.

The only point which now arises does so as a result of the decision of this court in *R. v. Worsell* (1), which was a rather unusual case depending very much on its own facts. Police officers had stopped a motor car and in that car were the appellant and two of his friends, one of the others being the owner of the car. Under the dashboard the police found a syringe and a small tube, and there is no doubt at all that the tube had at one time contained heroin. Indeed the appellant said that earlier in the day he had had a "fix" out of that tube. But the Crown had framed their case and conducted their case entirely on the basis of a quantity of heroin alleged to be found in that tube at the time of arrest. He said he had had a "fix", therefore he must have been in possession at some earlier stage of the same day. According to the evidence the tube appeared to be entirely empty; there was nothing visible to the human eye. The scientist called said that under a microscope it was possible to discern a very few small droplets which were impossible to measure and impossible to pour out. On that state of the evidence this court came to the conclusion that in truth the tube was empty, the droplets were invisible to the human eye, they could only be discerned under a microscope, they could not be measured or poured out, and in truth this was an empty tube with nothing in it.

In this case the evidence is not nearly so strong. One of the difficulties now is that because of the way in which the case was very reasonably being conducted at that time, the scientific expert was not being cross-examined with a view to showing that these scrapings really amounted to nothing. The case made was that it was only a very small quantity.

On the evidence of the scientific officer that what was found in each of the three pockets could in fact be measured and weighed in milligrammes, we do not think that as a matter of law it could be said that there was in truth no cannabis in the appellant's possession. It may be that it would have been right for the learned deputy recorder to leave to the jury as an issue of fact to find whether what was in the appellant's pockets was sufficient to amount to possession of cannabis, but, in our view, even if he had done that, the end of the case would have been inevitable; there would have been a conviction. If there was any error in treating it as axiomatic that the quantities did amount to cannabis, we would apply the proviso without hesitation.

We think this appeal must be dismissed. There is a clear distinction to be drawn on the facts between this case and *R. v. Worsell* (1).

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; Marshall & Eldridge, Oxford.*

T.R.F.B.

(1) Ante, p. 503; [1969] 2 All E.R. 1183.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND KARMINSKI, L.JJ., AND GEOFFREY LANE, J.)

April 21, 1969

R. v. GRIFFITHS

Criminal Law—Sentence—Suspended sentence—Subsequent offence of different character—Consideration whether suspended sentence should be brought into operation—Criminal Justice Act, 1967, s. 40 (1) (a).

In deciding whether a suspended sentence should be brought into operation pursuant to s. 40 (1) of the Criminal Justice Act, 1967, a court is entitled to look at the facts of the subsequent offence, and, if it thinks it right in the circumstances, to decide that, in view of the character of the subsequent offence, it would be unjust to bring the suspended sentence into operation.

APPEAL against sentence by William Thomas Griffiths who had been convicted at Birmingham Sessions before the recorder on October 10, 1968, of dangerous driving and common assault and sentenced to nine months' and three months' imprisonment respectively for these offences, the sentences to run concurrently. The recorder also ordered that a sentence of 12 months' imprisonment suspended for two years imposed on the appellant at Birmingham Sessions in 1968 on Jan. 5, 1968, in respect of factorybreaking with intent should come into effect consecutive to that sentence.

A. W. Palmer for the appellant.

The Crown was not represented.

WIDGERY, L.J., delivered this judgment of the court: The appellant was convicted of dangerous driving and common assault before the learned recorder of Birmingham on 10th October 1968. He was sentenced to concurrent terms of nine months' and three months' imprisonment respectively for those two offences, and the recorder also ordered that there should come into effect consecutive to that sentence a suspended sentence of 12 months' imprisonment which he had imposed on the appellant on 5th January 1968 in respect of factory-breaking with intent. The total sentence of imprisonment, therefore, was 21 months in all.

The circumstances of the instant offences were these. At about 10.50 p.m. on 5th May 1968, a police constable off duty was driving in Birmingham in his motor car and was following the appellant's car. The police constable's evidence was that the car was swerving across the road (by which one understands swerving on more than one occasion across the road) over a distance of about a quarter of a mile. It was said that, when the appellant swerved across the road, he came on occasion within a few inches of the offside kerb, and there was some indication that other cars coming in the opposite direction had been required to slow down or swerve. The police constable overtook the appellant and the two cars stopped. The police constable went to look at the registration number of the car and to identify the driver, and then an altercation resulted. There was some jostling on the pavement, and the appellant hit the officer with his clenched fist above the right eyebrow, causing a small cut, and hit him again below the left ear and punched him in the stomach. Fortunately he did not do him any great harm because the police constable was a fit man. However, there was this assault of, in the view of this court, quite a serious character.

The appellant is 33 years of age and he has a long record of convictions, but it is right to say at once that there is no previous offence of dangerous driving or anything akin thereto. There are a great many offences of housebreaking and factorybreaking, and there are a number of cases, some of them quite serious,

of wounding or assault. He was found guilty of assault on the police in 1957, and again in 1958, and of wounding in 1958 and, finally, a further assault on the police in 1961.

Two submissions are made on the appellant's behalf. First, it is said that the term of nine months' imprisonment for the instant offences was excessive, and counsel for the appellant's submission on this is re-inforced by the observations of the learned single judge, who pointed out that this was a first conviction for bad driving and said that many worse cases of dangerous driving are punished with less severity. The court has considered this submission with care, and takes the view that it, itself, might not have imposed a sentence of nine months' imprisonment for the dangerous driving alone. However, the other chapter of this case, namely, the violence which followed, is a matter which this court would be minded to take more seriously than did the recorder. To be precise about this, we feel that it might have been more appropriate if two consecutive terms had been imposed and if the term imposed in respect of the dangerous driving had been reduced. But, in the end, we are quite satisfied that a totality of nine months is not excessive in regard to these offences, and we accordingly dismiss the appeal so far as that part of the case is concerned.

One turns then to the question of whether the suspended sentence should have been ordered to take effect in these circumstances. Under s. 40 (1) of the Criminal Justice Act 1967, it is provided that where an offender who has received a suspended sentence subsequently comes before the court on an offence punishable with imprisonment, the court may take a number of alternative courses, the first of which is to:

"(a) ... order that the suspended sentence shall take effect with the original term unaltered; ... and a court shall make an order under paragraph (a) of this subsection [that is, an order that the suspended sentence should take effect with the original term unaltered] unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence ..."

Counsel for the appellant's submission is that, in the circumstances of this case, it was unjust to bring the suspended sentence into effect, having regard to the entirely different character of the offence for which the suspended sentence was imposed and the offences now before the court.

This is, we think, the first time on which the court has had to express an opinion on this matter; and it will say at once that the facts of the subsequent offence are clearly appropriate for consideration in deciding whether the suspended sentence should be put into effect. Undoubtedly a court operating this section is entitled to look at the facts of the subsequent offence and, if it thinks right in the circumstances, to say that it would be unjust in view of the character of that offence to make the suspended sentence operative. It seems to us inappropriate to attempt at this stage to deal with the subject in more general terms, and in this case we are minded only to consider the nature of the subsequent offences in relation to the appellant's character and background as a whole. He was admittedly a man who had not previously been in trouble for driving, but he was a man who had been in trouble for violence. Looking at the circumstances in the round, we have come to the conclusion that it would not be right to say that the action of the recorder was unjust. We shall, therefore, not disturb the exercise of his discretion, and the appeal is dismissed.

Solicitor: Registrar of Criminal Appeals.

Appeal dismissed.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND WILLIS, JJ.)

April 22, 1969

GARRETT v. ARTHUR CHURCHILL (GLASS) LTD. AND ANOTHER

Customs—Offence—Export—Being knowingly concerned in the exportation of goods with intent to evade prohibition—One single question involved—Burden of proof—Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 44), s. 56 (2), s. 290 (2).

By s. 56 (2) of the Customs and Excise Act, 1952: "Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade" the statutory prohibition against their exportation shall be liable to a penalty.

The respondent, C., who was a director of the respondent company, purchased a goblet for S., an American, who at all material times resided in America. S. instructed the respondent company to export the goblet to him in America. The exportation of the goblet without a licence was prohibited by the Export of Goods (Control) Order, 1955. The respondent knew this, informed S., and attempted to get a licence. S. later instructed the respondent to hand the goblet without a licence to one J.S., who would take it with him to America by air. An information was preferred against the respondent and the respondent company, charging them with being knowingly concerned in the exportation of the goblet with intent to avoid the prohibition on export, contrary to s. 56 (2) of the Customs and Excise Act, 1952. The justices found that, on the night before the aircraft on which J.S. was travelling left for America, the respondent handed the goblet to him, knowing that he was going to attempt to export it without a licence, but they acquitted both the respondent and the respondent company of the offence charged. On appeal by the prosecutor,

HELD: under s. 56 (2) one question only had to be answered, namely, whether C. was knowingly concerned in the exportation of the goblet with intent to evade the prohibition; the justices had divided the words of the section and considered whether he was knowingly concerned with the exportation, and, having come to the conclusion that he was not, they found it unnecessary to consider whether, if he were, it was with intent to evade; the case would be sent back to the justices to apply their minds to the proper question.

PER CURIAM: Despite s. 290 (2) of the Act, the burden of proving the requisite knowledge and intent remained on the prosecution and did not shift.

CASE STATED by Uxbridge, Middlesex, justices.

On 19th March 1968 an information was laid by the appellant, Colin John Garrett, charging that on 1st June 1966 at London (Heathrow) Airport in the area aforesaid the respondents, Arthur Churchill (Glass), Ltd., and Sidney Charles Crompton, were each knowingly concerned in the exportation of a Verzelini glass goblet with intent to evade the prohibition on exportation imposed by the Export of Goods (Control) Order 1965, contrary to s. 56 (2) of the Customs and Excise Act 1952.

On the hearing of the information at Uxbridge Magistrates' Court on July 16 1968 the following facts were proved or admitted. At all material times the respondent Crompton was a director of and acted on behalf of the respondent company. On 16th May 1966 a Verzelini goblet, known as the Winifred Geare goblet, was auctioned at Sotheby's. It was sold to the respondent Crompton, who was acting on behalf of Mr. Franz Siehel, an American, for £9,500. On 16th May 1966, the day of the sale, the respondent Crompton cabled the result of it to Mr. Siehel. On that day Mr. Siehel wrote to the respondent Crompton inviting suggestions about transportation. The respondent Crompton replied on 20th May that he was awaiting Mr. Siehel's views in case there was some probability of personal conveyance and that he had in mind Mr. Jerome Strauss, an American, who was a collector of glass and a personal friend of Mr. Siehel. The respondent

Crompton said that the alternative was using a reliable agent and suggested suitable firms. The respondent Crompton stated, "It will be necessary to obtain an export licence and U.S.A. consular certificate for an item of this value and this administrative aspect will be put in hand immediately." On 25th May 1966, Mr. Sichel wrote to the respondent Crompton that he had arranged for Mr. Strauss to take the goblet on his flight via Pan Am. to New York on 1st June. On Friday 27th May 1966, Mr. Sichel telephoned the respondent Crompton. Mr. Sichel said that Mr. Strauss had agreed to transport the goblet on his return to America early the following week and that accordingly it might be preferable for documents to be in Mr. Strauss' name. The respondent Crompton told Mr. Sichel that with Whitsun weekend intervening it would not be possible to obtain documentation by 31st May or 1st June and that if it was intended to remove the goblet permanently from the United Kingdom it was highly probable that an export licence would be required even though a personal conveyance had been decided on. Mr. Sichel said that until he had seen the goblet he could not decide his future intentions, that the respondent Crompton's part as buying agent was completed and that the respondent Crompton was to hand the goblet to Mr. Strauss without any documents for which action he would take full responsibility. On 31st May 1966, the respondent Crompton handed the goblet to Mr. Strauss, informing him that no documents were provided in accordance with Mr. Sichel's instructions. Shortly thereafter the goblet was taken to America. The exportation of the goblet without an export licence was prohibited.

It was contended before the justices by the appellant that as the respondents purchased the goblet for an American, and handed it to another American for export to America they were concerned in the exportation, that as they knew an export licence was required but had not been issued an intent to evade the prohibition on the exportation of the goblet was manifest. It was contended on behalf of the respondents that as a prohibition was in force in relation to the goblet, in accordance with the proviso to s. 79 (3) of the Customs and Excise Act 1952 the time of its exportation was deemed to be when the aircraft in which Mr. Strauss travelled to New York departed from Heathrow Airport. Prior to this time the respondent Crompton had handed the goblet to Mr. Strauss in accordance with instructions from Mr. Sichel, the owner, and that he had no option but to comply with that instruction as he would otherwise be liable to an action in detainue. To be concerned in the exportation of the goblet would involve a material connection with the actual exportation. Accordingly, as the respondent Crompton had lost all control over the goblet at the time of its exportation he was not concerned in its exportation.

The justices were of the opinion that the respondent Crompton knew from the very beginning that it was the intention to export the goblet to America and that such exportation was prohibited without a licence from the Board of Trade. They thought that the respondent Crompton believed that the exportation of the goblet would be done regularly until 27th May when he spoke to Mr. Sichel on the telephone. During that conversation it became known to the respondent Crompton that Mr. Sichel intended the goblet to be exported by Mr. Strauss without a licence and accordingly in breach of the prohibition. Mr. Sichel, who was the owner of the goblet gave a specific instruction to the respondent Crompton to hand the goblet to Mr. Strauss. The respondent Crompton handed the goblet to Mr. Strauss knowing that Mr. Strauss was going to export the goblet and evade the prohibition on its export. They considered that it was the respondent Crompton's legal duty to act in accordance with the owner's instruction, even though he knew that doing so might result in an illegal exportation. Once the

goblet was handed over, the respondent Crompton lost all control over it and in their view was not concerned in its exportation which took place thereafter. They accordingly dismissed the information. The prosecutor appealed.

The question for the opinion of the High Court was whether or not the justices' decision was legally correct.

Gordon Slynn for the appellant.

Ashe Lincoln, Q.C., and *S. E. Brodie* for the respondents.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the Middlesex area of Greater London, sitting at Uxbridge, who dismissed an information preferred by the appellant against the two respondents, for that each of the respondents had been knowingly concerned in the exportation of a Verzelini glass goblet with intent to evade the prohibition on exportation imposed by the Export of Goods (Control) Order 1965 (1), contrary to s. 56 (2) of the Customs and Excise Act 1952.

Before considering the facts, it is, I think, convenient to look at the few passages that are relevant in the legislation. Section 56 deals with offences in relation to exportation of prohibited or restricted goods, and by sub-s. (1) it is provided:

"If any goods are—(a) exported or shipped as stores; or (b) brought to any place in the United Kingdom for the purpose of being exported or shipped as stores, and the exportation or shipment is or would be contrary to any prohibition . . . the goods shall be liable to forfeiture and the exporter or intending exporter of the goods and any agent of his concerned in the exportation of shipment or intended exportation or shipment shall each be liable to a penalty of three times the value of the goods or one hundred pounds, whichever is the greater."

I read that merely to show that there the offence does not consist of an exportation with any intent to evade customs, and accordingly the penalty laid down is the moderate one of three times the value of the goods or £100, whichever is the greater. When however one gets to sub-s. (2), which lays down the offence with which the respondents are charged, there is an intent that has to be proved to evade the prohibition, and the penalty is far greater—"three times the value of the goods or one hundred pounds, whichever is the greater" that is the penalty under sub-s. (1) but also, "or to imprisonment for a term not exceeding two years, or to both". The prior part of sub-s. (2) is to this effect:

"Any person knowingly concerned in the exportation . . . of any goods with intent to evade any such prohibition or restriction as aforesaid shall be liable . . ."

The prohibition in the present case is the prohibition contained in the Export of Goods (Control) Order 1965. Article 1 provides that:

"Subject to the provisions of this Order—(i) goods of a description included in Schedule I hereto and therein indicated by the letter A are prohibited to be exported from the United Kingdom . . ."

and in Sch. 1 under heading "Group 9" there appears the following:

"*Valuables:* Articles not elsewhere specified, manufactured or produced more than 100 years before the date of exportation including works of art but not including postage stamps of philatelic interest, and similar articles . . ."

It is quite clear and admitted that the article here in question, this Verzelini goblet, consisted of Elizabethan glass of the 16th century, and clearly, was an article covered by Group 9 in Sch. 1. So much for the legislation.

The short facts were that the respondent Crompton, was a director of the respondent company, Arthur Churchill (Glass), Ltd., and was acting on its behalf; and acting on its behalf he on 16th May bought on behalf of an American, a Mr. Franz Sichel, this goblet when auctioned at Sotheby's and he bought it for £9,500. To take it quite shortly, he communicated with Mr. Sichel and he told Mr. Sichel very properly that it would be necessary to obtain an export licence, having regard to the prohibition, and a United States of America consular certificate, and that this he would put in hand immediately. However, Mr. Sichel was minded that the goblet should be brought back by hand, and finally on 25th May Mr. Sichel wrote that he had arranged for a Mr. Strauss to take the goblet on a Pan American World Airways flight to New York on 1st June. Now the dates here are of some importance. The very next day, 27th May, Mr. Sichel telephoned to the respondent Crompton and said that Mr. Strauss had agreed to take the goblet and suggesting that the documents should be in Mr. Strauss' name. Thereupon the respondent Crompton, again acting quite properly, pointed out that with the Whitsun weekend it would be impossible to obtain the necessary licence by 1st June. Thereupon Mr. Sichel said that the respondent Crompton's part as buying agent was completed, that he was to hand the goblet to Mr. Strauss without any documents at all and without any licence, and that he, Mr. Sichel, would take full responsibility. Thereupon the respondent Crompton handed the goblet to Mr. Strauss on 31st May and on 1st June Mr. Strauss took it to America.

It was on those short facts that the justices gave their opinion in the following terms, terms which include really findings of fact as well as of opinion. They stated:

"We were of the opinion that the [respondent Crompton] knew from the very beginning that it was the intention to export the goblet to America and that such exportation was prohibited without a licence from the Board of Trade. We think that the [respondent Crompton] believed that the exportation of the goblet would be done regularly until 27th May when he spoke to Mr. Sichel on the telephone. During that conversation it became known to the [respondent Crompton] that Mr. Sichel intended the goblet to be exported by Mr. Strauss without a licence and accordingly in breach of the prohibition. Mr. Sichel, who was the owner of the goblet gave a specific instruction to the [respondent Crompton] to hand the goblet to Mr. Strauss. The [respondent Crompton] handed the goblet to Mr. Strauss knowing that Mr. Strauss was going to export the goblet and evade the prohibition on its export."

Those are the facts that the justices found in their opinion, and then they went on to state:

"We considered that it was the [respondent Crompton's] legal duty to act in accordance with the owner's instruction, even though he knew that doing so might result in an illegal exportation. Once the goblet was handed over the [respondent Crompton] lost all control over it and in our view was not concerned in its exportation which took place thereafter. We accordingly dismissed the information."

Finally, the question left to the court is: "The question for the opinion of the High Court is whether or not our decision was legally correct." In my judgment, the strict answer to the question posed to the court, "whether or not our decision

was legally correct", was that it was not correct, but it is further my opinion that they did not apply their minds—certainly the Case does not reveal that they applied their minds—to the proper question. I say that, as worded, their decision was not correct in law for this reason, that albeit there was a legal duty in ordinary circumstances to hand over the goblet to the owners once the agency was determined, I do not think that an action would lie for breach of that duty if the handing over would constitute the offence of being knowingly concerned in its exportation. Secondly, as it seems to me, the justices arrived at their decision on the basis that a man could only be concerned with the exportation if he did something at the point of time which constitutes, under the Act, exportation. That, in this code of legislation, is the time laid down in s. 79 (3) in the proviso:

"Provided that in the case of goods of a class or description with respect to the exportation of which any prohibition . . . is for the time being in force under or by virtue of any enactment which are exported by . . . air, the time of exportation shall be deemed to be the time when the exporting . . . aircraft departs . . ."

In confining the activities which can amount to being concerned in exportation to that limited time, when the aircraft leaves, the justices were wrong. A man can be concerned with the exportation of goods by doing things in advance of the time when the aircraft leaves, and certainly handing over goods for export the night before the aircraft leaves seems to me quite clearly to amount to being "concerned in the exportation . . . of . . . goods".

As I have said, however, I do not think the justices asked themselves the correct question, because under s. 56 (2) the question is whether the respondent Crompton, was knowingly concerned in the exportation of this goblet with intent to evade the prohibition. I agree with counsel for the respondents' submission that that is to be treated as all one phrase and that one has to ask oneself that question. The justices, as it seems to me, have divided up the phrase and considered whether he was knowingly concerned with the exportation, and, having come to the conclusion that he was not, have found it unnecessary to consider whether, if he were, it was with intent to evade. As I have said, the matter must be looked on as one phrase and one question which has to be answered.

In those circumstances, I have had myself considerable doubt as to what is the correct procedure for this court. It can be said on the one hand that the last thing that the respondent Crompton intended was to evade the prohibition. That is really unanswerable up to 27th May when Mr. Sichel telephoned, and the real question is what happened thereafter. Did he then only hand over because he felt that he had to as his agency was terminated, or did he at that stage lend himself, if I can put it that way, to the idea of exporting this without the necessary documents? The justices had before them evidence, oral and documentary, which is not before this court, and it seems to me that the only proper course is to send this case back with the opinion of the court asking them to apply their minds to what, I think, is the proper question.

I would only add this, that in considering that question it has been urged by counsel for the appellant that under s. 290 (2) of the Customs and Excise Act 1952 the burden shifts to the respondents to negative that intent. I have read

and re-read s. 290 (2) and it seems to me quite impossible to say that that subsection provides for a shifting of the burden in a case such as this. It seems to me that it is for the prosecution to prove that what happened here is covered by the full phrase "knowingly concerned in the exportation . . . with intent to evade".

MELFORD STEVENSON, J.: I agree.

WILLIS, J.: I agree.

Case remitted.

Solicitors: *Solicitor, Customs and Excise; Herbert Smith & Co.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(HINCHCLIFFE, J.)

March 13, 14, 1969

WARD v. HERTFORDSHIRE COUNTY COUNCIL

Education—Negligence—Supervision of children—Playground before commencement of school—Flint wall—Injury to child while playing—Standards for School Premises Regulations 1959 (S.I. 1959 No. 890), reg. 51.

Children regularly arrived at a local authority primary school at between about 8.15 a.m. and 8.45 a.m. and then played in the playground without supervision until 8.55 a.m. when school began. The playground was surrounded by a wall which was made up of jagged flints. There had been previous accidents to children who had tripped, fallen or run against the wall. The plaintiff who was aged 8 years arrived early at school, and while playing in the playground before school began he fell and struck his head against the wall, suffering severe injuries. In an action by him against the local authority alleging negligence,

HELD: (i) the risk of such an accident was a reasonably foreseeable risk against which the defendants could and should have guarded either by rendering the wall or by putting up railings or netting, or they should have ensured that there was proper supervision during the time when children were in the playground before the start of school; (ii) the defendants were not liable under regulation 51 of the Standards for School Premises Regulations 1959 because the boundary wall was not part of the building for the purposes of those regulations.

ACTION by Timothy Roy Ward, an infant suing by his father and next friend, Roy Frederick Ward, claiming damages from Hertfordshire County Council for negligence and breach of statutory duty under reg. 51 of the Standards for School Premises Regulations 1959 and the Occupiers, Liability Act 1957.

C. W. G. Ross-Munro for the infant plaintiff.

J. C. Griffiths for the defendant.

HINCHCLIFFE, J.: In this action the infant plaintiff by his father claims damages for personal injuries as a result of an accident he sustained on 29th April 1966, when he was attending the Sarratt Primary School in the county of Hertford. On the day in question the infant plaintiff injured himself against a flint wall when he and other pupils were running a race in the playground of the school. It is alleged on behalf of the infant plaintiff that his accident was caused by the defendant's breach of statutory duty in connection with the

flint wall itself, and by the negligence of the defendant in failing to provide proper supervision; in not having the wall demolished having regard to previous accidents; and in failing to instruct or warn the infant plaintiff not to play near the wall. The defendant by its defence admits that the infant plaintiff fell against the wall after he had tripped whilst crossing the playground, but it denies that it was guilty of the alleged or any breach of statutory duty or negligence.

It is common ground that the infant plaintiff at the time of the accident was eight years of age. Most of the pupils arrived at the school at about 8.45 a.m. and they were left to play in the playground without supervision until 8.55 a.m., when they were summoned into the school by a bell or a whistle. The wall surrounding the playground was made of flints and brick pillars with a brick coping on the top. Some agreed photographs have been put before the court. In the grey bundle, there are four photographs. Number one is a view of the wall against which the infant plaintiff fell. The actual place where the infant plaintiff had his accident is to the left and is outside the picture. The second photograph shows a close-up view of an area of the wall, in the centre of which a brick pillar can be seen, and on each side of it there can be seen many pieces of flint. Photograph number three is a closer view. The arrows on that photograph indicate where it is alleged the flints were particularly prominent, jutting out for one inch to one and a quarter inches. Photograph number four is another close-up view of the wall with two points marked where the flints jut out. The average height of the wall is three feet six inches. There are two other photographs which have been agreed; they are larger in size. Photograph number one shows the wall in question and photograph number two gives a good idea of the composition of the wall.

It is not in dispute that the infant plaintiff and his mother arrived at about 8.50 on the morning of the accident. The infant plaintiff and his friends decided to have a race from wall to wall. When this race was nearly over, and when the infant plaintiff was in the lead, he stumbled and his head crashed into one of the flints of the wall inflicting on him a serious injury. There had been three previous instances where pupils fell or ran into the same wall and sustained injuries for which they were treated by a school teacher. And on 14th February 1968 the infant plaintiff's sister, Sarah, stumbled when skipping and hit the back of her head against the wall.

The infant plaintiff gave evidence: he described the accident much as I have stated it and his evidence was not in any way challenged. Mrs. Ward explained that she took both her children to school most days of the week: she said she never saw anyone supervising the pupils in the playground: and after the accident she saw that the infant plaintiff had sustained a long jagged cut over the right eye which was two inches long. Mr. Ward, a nurseryman, saw the infant plaintiff's wound in hospital; he described it as long, jagged and frightening. It appeared to Mr. Ward that the infant plaintiff had come up against a protruding part of the wall and had struck himself against a very jagged piece of flint. Mr. Ward said that nothing had been done to the wall since the accident. This is admitted by the defendant.

Young Godman, aged seven or eight, gave evidence. He was one of the boys who arrive at 8.15 a.m. and he played in the playground until the school started at 9 a.m. For the most part, the majority of pupils would arrive at about 8.45 a.m., many of them came by bus which reached the school at about that time. The little girl, Sarah Ward, gave evidence; she is a bright little girl if ever there was one. It was in February of 1968 when she tripped over

a skipping rope held by two other girls. Possibly they pulled it tight at an awkward moment. At any rate, she fell sideways and cut open the back of her head on this selfsame flint wall.

Mr. Bidderstaff, Mr. Parker, and Mr. Styles were former pupils of the school. Each one of them had been injured, when they tripped, fell, or ran against the wall. Mr. Bidderstaff's accident was in 1935; the other two accidents were in 1954 or 1955. It is right that I should mention that Mr. Bidderstaff injured his forehead by coming into contact with the facings of the wall at the top. Mr. Parker and Mr. Styles were injured by sharp flints in the wall.

The only other witness who gave evidence on behalf of the infant plaintiff was Mr. Stanton, a consulting engineer, who described the flints on the whole as being broken ones—many of them had jagged edges and knife-like ridges. The spurs, as he called them, protruded from three-quarters of an inch to one inch. Some of them were very sharp indeed and some of them were rounded. Mr. Stanton expressed the view that if the wall had been rendered and made smooth the severity of injury would be materially decreased.

The whole length of the wall shown in the photographs is 84 feet; the wall opposite to it is 104 feet long, and it was between the two walls that the race was taking place. Opposite the school building there is another shorter length of wall 26 feet long. All the walls are made of flint. Mr. Stanton thought that there would be no difficulty in rendering the walls and making them smooth for about £400. He regarded it as a perfectly straightforward task.

On behalf of the defendant, Mr. Edgar Stephens, a chartered architect, gave evidence. He explained to the court that there is much flint in this village; that he would not like to see these walls rendered, not only because aesthetically it would not be right, but also because problems would arise in making the walls waterproof. He did, however, agree that there was a good bonding agent on the market known as "PBA", which is waterproof. He recognised that the job could be done, but he thought that it would cost just under £1,000.

Counsel for the infant plaintiff put one or two questions to Mr. Stephens in his capacity as a father, and Mr. Stephens agreed that boys between five and 11 tend to play roughly; that it was normal for them to run races between walls; that it was foreseeable that they might well come into contact with one of the walls. He was not surprised to hear of the three previous accidents, nor was he surprised to hear of the infant plaintiff's accident. Mr. Stephens said that a wall with a smooth surface in a children's playground, in his opinion, would be less dangerous.

Mr. Robert Tawell, a chartered surveyor in the full-time employment of the defendant, told the court that this type of wall was not unusual; that in the area there were sixteen other schools which catered for children up to 11 years of age. He thought that this school would be about 110 years old and that it was coming to the end of its life. He thought that the walls surrounding the playground were marginally more dangerous than many brick walls, yet he said there were walls throughout the country in Yorkshire, in Wales and in Kent, which he felt would carry a similar risk. Mr. Tawell did not think that it was satisfactory to render the walls of the school building up to four feet six inches because there would be difficulty in waterproofing. When Mr. Tawell was sent to inspect the schools soon after the accident to the infant plaintiff had taken place, he did not know that there had been any previous accidents; indeed he had been told that there had been none. Six of the other 16 schools have flint walls around the playgrounds, all the walls are comprised of whole flints and of broken flints. Mr. Tawell did not think that this wall was an undue

hazard although he did not know of the three previous accidents. No one has tried to render the wall or do anything at all about it since the infant plaintiff's accident.

The only other witness called on behalf of the defendant was Mr. Kenneth Green. He has been the headmaster of the school since 1955. He has been a schoolmaster for 23 years. He told the court that up to 8.55 a.m. there was no supervision in the playground of any sort or kind. The children assembled in the playground from 8.30 a.m. onwards when some buses arrived, others arriving at 8.45 a.m. There were fifty children in the school which is run by Mr. Green and two assistant teachers. There are three breaks during the day, and in each one the playground is supervised with the object of seeing that the children are not in danger. As I have already stated, there is no supervision before school starts, and the children are allowed to play in the playground. Mr. Green had no knowledge of the accident to Mr. Bidderstaff or to Mr. Parker, but he was present when Mr. Styles had his accident. Mr. Green thought he had broken half a tooth on the top part of the wall. Mr. Green expressed the view that the wall was safe; he knows that children do race one another between the walls and he agreed that sometimes there was a risk of them being tripped or stumbling, or indeed, of being pushed. He had told children not to be silly and to keep clear of the wall.

It is on this evidence that the court has to determine whether the defendant was in breach of any statutory duty or common law duty which caused, or contributed, to the infant plaintiff's accident. I have no hesitation at all in finding on the facts of this case that the defendant was guilty of a breach of its common law duty, and that such breach of duty caused the infant plaintiff's injury. The court is indebted to both learned counsel appearing in this case for their most helpful submissions on the law and on the facts, but I find the position to be as follows—

Before 8.55 a.m. children aged between five and 11 are let loose in this playground without any supervision. Games are played, some of them are rough, some of them are not so rough; they certainly include running races between these flint walls. This is known to the school teachers who supervise the pupils during the morning, the midday, and the afternoon breaks. Around this playground are flint walls in which there are many broken flints with sharp, jagged edges which protrude $\frac{3}{4}$ of an inch to one inch from the wall itself. I am satisfied that it was on one of these very sharp flints that the infant plaintiff sustained so severe a cut or laceration that he fractured his skull. His sister Sarah, aged six or seven, fell on to one of these flints and had the back of her head split open, and three men sustained injury by coming into contact with the wall when they were pupils of the school. Two of them were injured by sharp flints. Mr. Bidderstaff bruised his forehead by coming into contact with the top of the wall, and as counsel for the infant plaintiff points out, this gives a clear indication as to the sort of injury that a person is likely to receive if his head comes in contact with a smooth wall rather than one with the jagged and sharp flints in it.

It seems to me that if one lets loose young children in a playground of this sort with inherently dangerous walls around it, one is simply asking for trouble. If it is thought necessary to supervise children at 10.45 a.m., midday and 2.30 p.m. surely it is just as necessary to supervise them between 8.30 a.m. or 8.45 a.m. and 8.55 a.m., and if there had been supervision, I have no doubt that a teacher would and should have stopped racing between these flint walls, having regard to the risk of a stumble, a push, or even a failure to stop. In the circumstances the risk of an accident such as this was a reasonably foreseeable risk

against which the defendant could, and should, have guarded, either by rendering the wall or by putting up some railings, or by putting up netting—the rendering or the railings, or netting, would not cost more than £400; or if they were not minded to do that, then all they had to do was to see to it that there was proper supervision—supervision during the time when a collection of children are in the playground before the start of school.

In my judgment, a prudent parent of a large family would have realised that this playground, with its flint walls and sharp and jagged flints protruding, was inherently dangerous. In my judgment reasonable supervision was required, not only during the working day, but also when the children were collected together in the playground before the school starts. I do not suggest that there should necessarily be a continuous supervision from 8.15 a.m. onwards, but there should have been supervision from time to time controlling any risky activity of the children having regard to the proximity of this dangerous wall; and really it is not too much to ask that there should be supervision between 8.30 a.m. or 8.45 a.m. and 8.55 a.m. when the supervision might well have been continuous. I am bound to say that I take the view that these sharp and protruding flints in a playground are much, much more dangerous than smooth walls, or walls that are to be found in the north of England, in Kent, or in the Cotswolds.

The infant plaintiff has not established, to my satisfaction, that the defendant was in breach of reg. 51 of the Standards for School Premises Regulations 1959. I accept the submission made by counsel for the defendant, that this case does not really fall within reg. 51, because the accident took place on a boundary wall and the boundary wall cannot be said to be part of the building. That seems to me to be a submission that is right in law; and is one full of common sense. I take the view that this regulation relates to a building in the conventional sense and that it is the occupants of the building whose safety is being considered. If I had thought that these walls fell within the ambit of the regulation, then I would agree with VEALE, J., who held in *Reffell v. Surrey County Council* (1), that an absolute statutory duty is created.

Was the defendant in breach of its statutory duty under the Occupiers' Liability Act 1957 to see that the children would be reasonably safe in using the premises for the purpose for which they were there? Well, the duty under this Act is really the common law duty: it is to take reasonable care for the safety of the children. It is to take such care for its pupils as a reasonably careful father would take with a large family in relation to his own children. In the circumstances of this case and for the reasons I have given, I have come to the conclusion that the defendant was in breach of its common law duty and that such breach of duty caused the infant plaintiff's injuries.

Judgment for the infant plaintiff.

Solicitors: Church, Adams, Tatham & Co.; Berrymans.

A.F.B.S.

(1) 128 J.P. 261; [1964] 1 All E.R. 743.

QUEEN BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND WILLIS, J.J.)

April 21, 1969

PRATT v. HAYWARD

Road Traffic—Parking—Restriction on waiting—Unloading—Machine placed on pavement of busy road—Vehicle moved 50 yds. to quieter road in "No through road"—Return of driver to complete delivery—County of Dorset (Various Roads, Swanage) (Prohibition and Restriction on Waiting) Order, 1967.

The respondent drove a van to the entrance of a golf course where he was delivering a mowing machine. The golf course was in a restricted road, where a vehicle might wait only so long as was necessary to enable goods to be unloaded from it. As the road carried a heavy volume of traffic, the respondent decided to place the machine on the pavement and drive the van some 50 yards forward into a "No through road" (also a restricted road), park it there, and then return to deliver the machine. An information was preferred against him charging him with causing a motor vehicle to wait in a prohibited area, contrary to the County of Dorset (Various Roads, Swanage) (Prohibition and Restriction on Waiting) Order 1967, but was dismissed by the justices. On appeal by the prosecutor,

HELD: although in the ordinary course of events the process of unloading could embrace the full time occupied in delivering goods from a van to the premises to which they were going, the position was different where the van had been removed from the place of unloading to another street; in such circumstances the unloading could not be said to be continued in that other street; and, therefore, the case must be remitted to the justices with a direction to convict, though, no doubt, they would regard the offence as purely technical.

CASE STATED by justices for the county of Dorset.

An information was preferred at Swanage Magistrates' Court by the appellant, Frank Pratt, against the respondent, John Arthur Palmer Hayward, alleging that the respondent, on the 28th June 1968, at Swanage, caused a certain motor vehicle to wait in a prohibited area, contrary to the County of Dorset (Various Roads, Swanage) (Prohibition and Restriction of Waiting) Order, 1967.

The respondent drove a van on the 28th June 1968 in connection with his business to the entrance to the Miniature Golf Course in Encombe Road, Swanage, where he was delivering a mowing machine. Encombe Road was a restricted road, but the regulations enabled a person to cause or permit a vehicle to wait in it for so long as might be necessary to enable goods to be unloaded from the vehicle. The road was a very busy road carrying a considerable volume of traffic, and the respondent decided, in the interests of traffic, to place the machine on the pavement and drive on some 50 yards into a "No through road" leading to a hotel where there was no traffic that he could impede. He then came back to deliver the mowing machine, and while he was absent the lorry was found waiting in the "No through road", which also was a restricted road subject to permission to remain for unloading.

The justices were of opinion that while the vehicle was waiting in the "No through road" the process of unloading was still taking place and dismissed the information. The prosecutor appealed.

J. Main for the appellant.

The respondent did not appear.

LORD PARKER, C.J. [after stating the facts]: The justices came to a decision which I for my part think was a sensible decision and should, if possible, be upheld—that the respondent was only doing something which would

make the traffic less difficult—and that while the vehicle was waiting in the “No through road”, the process of unloading was still taking place.

Unfortunately, I have come to the conclusion that the justices as a matter of strict law were wrong. It may well be that in the ordinary course of events unloading will embrace the time taken not only physically to take goods off a vehicle and place them on the pavement, but also the full time occupied in delivering the goods from the van to the premises to which they are going. That I think is perfectly clear, and, if authority were needed, there is the persuasive authority of *MacLeod v. Wojkowska* (1) in the High Court of Judiciary in Scotland. But it seems to me that the position is quite different once the vehicle is moved from the place of unloading, as it was in this case, into another street. It seems to me impossible to suggest that it is being unloaded there. Accordingly, this appeal succeeds. It follows that the case must be sent back to the justices with a direction to convict.

Sentence, of course, is not for this court, but I should myself be surprised if, in the circumstances of this case, the respondent were not given an absolute discharge. In saying that, I am not suggesting that this is a prosecution that ought never to have been brought, because as counsel for the appellant quite rightly points out, the police do need guidance on a case such as this which may involve many types of goods including, for all one knows, a load of gravel or sand.

MELFORD STEVENSON, J.: I agree.

WILLIS, J.: I agree.

Case remitted: direction to convict.

Solicitors: *Sharpe, Pritchard & Co., for J. R. Pryer, Dorchester,*

T.R.F.B.

(1) [1963] Sc.L.T. (Notes Rec. Cas.) 51.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND KARMINSKI, L.JJ., AND GEOFFREY LANE, J.)

April 24, 1969

R. v. NIXON

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Specimen of blood—Division into parts—Sample given to defendant—Capability of analysis—Burden of proof—Quality—Analysis by use of ordinary equipment and ordinary skill—Analysis possible only by use of expensive or highly-sophisticated equipment—Road Traffic Act 1962 (10 & 11 Eliz. 2 c. 59), s. 2 (4).

Where a defendant has supplied a specimen of blood under s. 3 (1) of the Road Safety Act, 1967, and that specimen has been divided into parts one of which has been given to the defendant, the burden of proving that that part is capable of analysis by the use of ordinary equipment and ordinary skill by a reasonable skilled analyst is on the prosecution.

PER CURIAM: If the part provided for the defendant is of such quality that analysis of it is possible only by using expensive or highly-sophisticated equipment available only to the favoured few, the analyst's certificate could not be admitted in evidence.



APPLICATION by John Hawkins Nixon for leave to appeal against his conviction at the Lancashire County Quarter Sessions on 8th May, 1968, when he was found guilty of driving a motor car having consumed alcohol in such a quantity that the proportion in his blood exceeded the prescribed limit contrary to s. 1 (1) of the Road Safety Act, 1967, was fined £50, and was disqualified from driving for 12 months.

E. Sanderson Temple, Q.C., for the applicant.

J. H. Lord for the Crown.

GEOFFREY LANE, J., delivered this judgment of the court: On 8th May 1968 the applicant was convicted at the quarter sessions for the county of Lancaster of driving a motor vehicle with an undue proportion of alcohol in his blood. For that offence he was fined £50 (with one month's imprisonment in default of payment of the fine) and disqualified from driving or from holding a driving licence for 12 months. Against that conviction he now asks for leave to appeal.

The trial started on 3rd April, but before the jury were sworn counsel for the applicant took objection to the admissibility of the proposed scientific evidence for the prosecution aimed at proving the percentage of blood-alcohol. The course was taken of trying this preliminary issue there and then. The chairman in due course ruled that the evidence was admissible, and the trial was then adjourned for the defence to consider their position, amongst other matters. At the resumed hearing, the scientific evidence having been given, the jury convicted on this count alleging driving with an excess of alcohol in the blood and acquitted on a further count of dangerous driving, which accordingly does not concern this court.

The applicant now applies for leave to appeal against that conviction on the following grounds: (i) that the chairman was wrong in law and/or wrongly exercised his discretion in permitting evidence to be adduced as to the proportion of alcohol found in a sample of blood taken from the applicant in view of the fact that the sample taken on the same occasion and furnished to the applicant was found (rightly or wrongly) by a public analyst to be so clotted as to be incapable of analysis, with the consequence that the applicant was deprived of the opportunity of having such sample independently analysed; (ii) failure by the chairman to warn the jury of the danger of accepting and acting on the prosecution's evidence as to blood-alcohol content in circumstances (beyond his control) where the applicant had been deprived of the opportunity of an independent analysis of the sample supplied to him. A third ground relating to the necessary approval of the breath test device has been abandoned by counsel for the applicant.

Soon after midnight on 23rd October 1967 the applicant, driving his Jaguar motor car, was involved in a collision. A police sergeant went to the scene, and in due course asked the applicant to submit to a breath test. That test proved positive, as did a second test which was carried out when the police sergeant and the applicant reached the police station. The applicant was then requested to provide a specimen of blood, and was duly warned of the consequences of a refusal of that request, and a Dr. Mechie attended to take the specimen. There was some difficulty over the taking of the specimen, because the applicant declined to allow the doctor to take the specimen from the lobe of the ear, which the doctor wished to do, and insisted that the bulb of the thumb should be used instead.

In the event three capsules were filled with blood from the bulb of the thumb, and Dr. Mechie gave evidence that in each capsule there were what appeared

to be the necessary anti-coagulant crystals. The applicant was invited to select one of the capsules, which he did, and was advised to keep it in a refrigerator pending analysis. The other two specimens were on the same day delivered to Dr. Skuse, a Home Office scientific officer, and he analysed them and found, in short, that they contained almost double the permitted quantity of alcohol.

It was with regard to the third specimen that the difficulty in this case arose. The applicant took this specimen on the same day to his own doctor, Dr. Elkin, and Dr. Elkin sent the specimen to the biochemistry department of a local hospital. For reasons which did not emerge in the evidence he recovered the specimen from the hospital on the following Thursday (without, it seems, any analysis having been carried out in the hospital) and returned the specimen to the applicant. Arrangements were then made for the specimen to be submitted to a public analyst, and on Friday 27th October 1967 the applicant himself took the specimen to a Mr. Tennyson Harris, who is a Fellow of the Royal Institute of Chemistry and a Fellow of the Pharmaceutical Society, as well as holding an appointment as a public analyst for the district.

It was on the evidence of Mr. Tennyson Harris that the applicant in the main founded his objections to the admissibility of the evidence for the prosecution. He (Mr. Harris) gave evidence at the quarter sessions on 3rd April that the specimen which he received was so badly clotted that it was impossible to obtain a representative sample for analysis; so badly clotted, he said, that he formed the impression that no anti-coagulant had been added to the specimen or, if it had been added, then the sample must have been clotted before it reached the capsule. No doubt there was enough in quantity, but clotting prevented him from analysing it. He agreed that it is sometimes possible to overcome such apparent difficulty by the use of an instrument called a micro-sieve. He said that he had, in fact, on this occasion used a micro-sieve of his own design, but had used it without success, and he agreed that some micro-sieves are probably more effective than others.

Dr. Meehie, who took the sample, told the court that the blood which he took from the bulb of the applicant's thumb was certainly not clotted before it went into the capsule, because he saw it running down the side of the capsule; and, furthermore, he also gave evidence that there were certainly crystals, which he took to be anti-coagulant crystals, in these capsules (in each of the three) before he put the blood into them. Dr. Skuse, the Home Office analyst, also gave evidence on this preliminary point, to the effect that there was, in his view, no degree of clotting which would render proper analysis impossible, providing that there was a sufficient quantity of blood and a suitably fine sieve was used. He said this:

"I have analysed blood samples which have been almost completely clotted by this method, by forcing them up through the sieve. If the sample is too small—very tiny—then of course you cannot pass it through the sieve."

On the preliminary issue the learned chairman reached the following conclusion. He first of all set out the way he directed himself on the law in these words:

"In my view the prosecution must establish that the third sample was sufficient and capable of analysis and the burden, in my view, is on the prosecution to show this and, therefore, I must consider the evidence which has been given on this very issue."

With that statement of the burden of proof this court entirely agrees. Then, applying what he had heard by way of evidence, to the law as he directed himself, he said this:

"I accept Dr. Skuse's evidence. I am, therefore, quite satisfied that the third sample was capable and sufficient to analyse in October, being analysed with the necessary equipment and skill. The evidence does not in my view become inadmissible because the particular analyst was unable to analyse it. I am satisfied that the third sample was capable of analysis and sufficient for analysis at the material time and, therefore, this evidence is admissible."

The applicant puts his case in this way. In order that the analyst's certificate may be adduced in evidence by the prosecution certain statutory conditions have to be fulfilled by virtue of s. 3 of the Road Safety Act 1967 and s. 2 of the Road Traffic Act 1962. The material provision is contained in s. 2 (4) of the last-mentioned Act, which provides:

"Where the accused, at the time a specimen of blood or urine was taken from or provided by him, asked to be supplied with such a specimen, evidence of the proportion of alcohol or any drug found in the specimen shall not be admissible on behalf of the prosecution unless—(a) the specimen is either one of two taken or provided on the same occasion or is part of a single specimen which was divided into two parts at the time it was taken or provided; and (b) the other specimen or part was supplied to the accused."

Lowery v. Hallard (1)—a decision under s. 14 of the Sale of Food and Drugs Act 1875—makes it clear (if indeed any further clarification is required) that each of the parts into which an article is required to be divided under that Act, and indeed this Act as well, must be sufficient to admit of proper analysis. Likewise under the Act of 1962, it is equally clear to this court, in the light of the wording of the Act itself and also in the light of the judgment of LORD PARKER, C.J., in *Earl v. Roy* (2), that the specimens provided (quantity apart) must be of such a quality as to permit a reasonably competent analyst using readily available equipment to make a proper analysis.

If, for example, the specimen provided for the accused under the Road Traffic Act 1962 is of such a quality that analysis is only possible by using expensive or highly-sophisticated equipment which is only available to the favoured few, the prosecution would fail to prove the admissibility of the analyst's certificate. Indeed, in *Earl v. Roy* (2) that point is made. But in *Earl v. Roy* (2) the difficulty was that the quantity of blood available was insufficient, and it seems that the blood in that case was not merely clotted but was so congealed as to be only capable of analysis by a highly expensive piece of equipment which is called gas chromatography.

In this case there was ample evidence on which the learned chairman could come to the conclusion, as he obviously did, that the specimen was capable of analysis by the use of ordinary equipment and ordinary skill by a reasonably competent analyst. Accordingly, in the judgment of this court, the main ground of appeal, namely, that this evidence should have been rejected by the learned chairman, fails.

The two further points raised by counsel for the applicant in his persuasive and able argument can perhaps be dealt with more shortly. He suggests that, even though the evidence was held by the learned chairman to be admissible, and assuming the learned chairman to be correct on that point, he should have exercised some form of discretion to exclude the evidence nevertheless. In the judgment of this court, having ruled that the evidence was admissible, we consider that he acted correctly in permitting the evidence to go before the

(1) 70 J.P. 57; [1906] 1 K.B. 398.

(2) Ante p. 427; [1969] 2 All E.R. 684.

jury as he did. It is further submitted that, having admitted the evidence, the chairman should then have issued some warning to the jury on the dangers of acting on it when the applicant had by mischance taken his own sample to an analyst who proved unable to analyse it.

This court takes the view that the chairman did all that could be expected of him in outlining to the jury, as he did, the difficulties which had arisen over the analysis of the sample, and then emphasising to them that in the light of all the evidence they must only convict if they were sure that the evidence of Dr. Skuse could be accepted. Accordingly, the two subsidiary points fail likewise, and this application must be refused.

Application refused.

Solicitors: *Julian S. Goldstone & Co.*, Manchester; *Clift, Dromgoole & Carter*, Lancaster.

T.R.F.B.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD UPJOHN, LORD DONOVAN AND LORD WILBERFORCE)

May 12, 13, 14, 15, 19, 20, 21, July 16, 1969

BIRMINGHAM CITY CORPORATION v. WEST MIDLAND BAPTIST (TRUST) ASSOCIATION (INCORPORATED)

Compulsory Purchase—Assessment—Date as at which compensation is to be made—Sale in open market—Equivalent reinstatement—Acquisition of Land (Assessment of Compensation) Act 1919, s. 2, r. 2, r. 5.

Compensation for the compulsory purchase of land under rr. 2 and 5 of the Acquisition of Land (Assessment of Compensation) Act, 1919, is to be assessed, under r. 2, as at the date when the value is being agreed, or is being assessed by the appropriate tribunal, or, if it is earlier, the date when possession was taken (per LORD DONOVAN, when the promoter becomes the owner of the property, whether in law or equity, in place of the expropriated owner and enters into possession of it); and, under r. 5, the appropriate date is the earliest date at which the owner of the property taken could reasonably have begun replacement; but under neither rule is compensation to be assessed by reference to values or the cost of equivalent reinstatement at the date of the notice to treat.

APPEAL by Birmingham City Corporation from an order of the Court of Appeal (SELLERS, SALMON and SACHS, L.JJ.) reported 132 J.P. 127, allowing the appeal of the respondents, the West Midland Baptist (Trust) Association (Inc.), from a decision of the Lands Tribunal determining the compensation payable by the appellants to the respondents in respect of the compulsory acquisition of the People's Chapel, Great King Street, Birmingham.

K. F. Goodfellow, Q.C. and J. D. James for the appellants.

D. G. Widdicombe, Q.C. and David Trustram Eve for the respondents.

Their Lordships took time for consideration.

16th July. The following opinions were delivered.

LORD REID: In 1947 the appellants obtained a compulsory purchase order covering an area of 981 acres in the centre of Birmingham. Within this area was a site belonging to the respondents, on which was "The People's

Chapel". By statute registration of this order on 14th August 1947 had the effect that notice to treat was deemed to have been served on that date on the respondents and on the numerous other owners of land within that area. It was obvious that redevelopment of this area would take a long time. The respondents wished to continue to use their chapel and it was understood that in due course the appellants would make another site available for rebuilding it, although they may not have been under a legal obligation to do this. In 1958 a site for a new chapel was offered to the respondents and they accepted it in 1959. The property of the old site was not vested in the appellants until 24th June 1963. The determination of the amount of compensation due to the respondents was referred to the Lands Tribunal in 1965.

The assessment of compensation for compulsory acquisition of land is now regulated by six rules set out in s. 2 of the Acquisition of Land (Assessment of Compensation) Act 1919. It has not been argued that r. (3) and r. (4) throw any light on the question in issue in this case. The other rules are as follows:

"(1) No allowance shall be made on account of the acquisition being compulsory:

"(2) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant: . . .

"(5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement:

"(6) The provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

It was agreed that in this case compensation falls to be assessed under r. (5) and r. (6). And it was further agreed that £5,025 should be awarded under r. (6). The question at issue in this case is the meaning of "the basis of the reasonable cost of equivalent reinstatement" in r. (5). The appellants argue that we are required to assume that equivalent re-instatement took place at the date of the notice to treat in 1947 and that r. (5) requires an assessment of what the cost of such re-instatement would have been at that date. If that is right it is agreed that that cost would have been £50,025. The respondents argue that the proper date for assessing that cost is the date at which re-instatement might reasonably have begun. If that is right, that date is agreed to have been 30th April 1961 and it is agreed that the cost would then have been £89,575. The difference between these two figures is accounted for by the steady rise of costs of all kinds since the last war. In fact rebuilding of the chapel was only begun in 1965 but apparently the date in 1961 has been agreed because there was some unnecessary delay on the part of the respondents. Quite properly the respondents admit that it was their duty to take all reasonable steps to minimise their claim, and that they cannot found on their own delay to increase the liability of the appellants. I understood from their counsel that the date on which re-instatement might reasonably have begun was the date by which they could have made contracts for the rebuilding work which would have determined its total cost.

The substance of r. (2), r. (5) and r. (6) was not new in 1919 and these rules must be interpreted in light of the provisions of the Lands Clauses Consolidation Act 1845, and of later decisions of the courts. In 1845 and for many years thereafter compulsory purchase of land was generally authorised by private Acts of Parliament. Before 1845 these Acts generally contained a number of sections regulating procedure and the Act of 1845 enacted a standard code which would apply except insofar as varied by a particular Act. Broadly speaking, the position was that each Act conferred on the promoters power to take specified lands. But it was not certain at the time when the Act was passed that the promoters would take all the land they were authorised to take. They might not proceed with their scheme, or, if they did, they might not find it necessary to take all the land they were authorised to take.

If the promoters decided to take particular land the first step they had to take was to serve notice to treat on persons who had interests in that land. By s. 18 of the Act of 1845 the notice to treat had to require the person on whom it was served to state particulars of his interest and of his claims, but it has been held that he can amend this claim later. The notice to treat did not give to the promoters any right, title or interest in the land. It enabled the promoters to proceed to have compensation assessed, to take possession if certain requirements were fulfilled and ultimately to obtain a title to the land taken. And it enabled the person on whom it was served to take action himself to compel the owners to pay for and take the land if he did not wish to wait for the promoters to act. And it was soon decided that it had another effect; the owner of the land could not, after receiving the notice to treat, increase the burden of compensation on the promoters by creating new interests in the land or by making improvements on it. He was not prevented from creating a new interest or making an improvement but if he did so the promoters did not have to pay for it.

The Act of 1845 does not define the basis on which compensation is to be assessed. Section 63 merely provides that:

"regard shall be had . . . not only to the value of the land to be purchased or taken by the promoters of the undertaking but also to the damage if any to be sustained by the owners of the land by reason of"

severance or injurious affection. It has always been recognised that the value of the land means its value to the owner and does not mean its value to the promoters or its value in the open market. If the owner is in occupation the value of the land to him may far exceed its value in the open market. If he wishes to continue his activities he will not only have to obtain other premises but he will have to pay costs of removal and if he is carrying on business the move may cause loss of profits and other loss. He will not be fully compensated unless all this is taken into account.

Apart from severance and injurious affection there is only one subject for compensation—the value of the land (see *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.* (1)). But it was convenient and it became customary to value separately the market value of the land and the other elements comprised in its value to the owner and then to add these together to obtain the total value to the owner. And it further became customary to add 10 per cent. in respect of the expropriation being compulsory. Rule (1) abolished this addition of 10 per cent.

But it came to be recognised that this method did not always produce a fair result and in certain classes of cases the cost of re-instatement was adopted as giving a better assessment of the value of the land to the owner who was

(1) (1887), 12 App. Cas. 315.

being dispossessed. In *Metropolitan Ry. Co. and Metropolitan District Ry. Co. v. Burrow* (1) LORD COLERIDGE, C.J., said:

"... according to my recollection, in my very moderate experience of such things when I was at the bar, it was not at all an uncommon way of testing what sums of money you were to pay to a claimant to look at the position in which he was when the railway company turned him out and say what it would cost him to get into the same position, or a position equally advantageous to that from which he had been displaced by the company. If that is so, what will it cost to reinstate me in the position from which you have precluded me? It is perfectly true you are not bound to do that. You are only bound to pay damages; but if the sum he has to pay to get into the equally advantageous position is a sum forced upon him by the action of the company against him in invitum, then that is the measure of damages which they have occasioned him. It is merely a question, I say, of how you can describe it. Perhaps it is better to avoid the word reinstatement, for it is not in the Act; but the idea is substantially there, and may be used as a means of ascertaining what sum of money is to be paid."

And in an arbitration arising out of the taking by the North British Railway Company of a part of West Princes Street Gardens Edinburgh (2) LORD SHAND acting as arbiter said:

"Where a church or public building or business premises are taken or so seriously interfered with by a railway company that they can no longer be properly used for the purpose for which they were erected or occupied, the cost of reinstatement is, generally speaking, a fair mode of fixing the compensation due."

In the 5th edition of CRIPPS ON COMPENSATION (the last I think to be edited by LORD PARMOOR) it is said:

"There are some cases in which the income derived, or probably to be derived, from land would not constitute a fair basis in assessing the value to the owner, and then the principle of reinstatement should be applied. This principle is that the owner cannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken by premises or lands which would be to him of the same value. It is not possible to give an exhaustive catalogue of all cases to which the principle of reinstatement is applicable. But we may instance churches, schools, hospitals, houses of an exceptional character, and business premises in which the business can only be carried on under special conditions or by means of special licences."

and this is substantially repeated in the 8th edition of 1938.

These passages show clearly that their authors were assuming that the assessed cost of re-instatement would be sufficient to enable the owner to re-instate himself if he acted reasonably. But the appellants maintain that long before any of them was written it had become a rule of law that the value of land to the owner must always be assessed as at the date of the notice to treat, whether or not that was in fact sufficient to enable the owner to re-instate himself as soon as that was reasonably practicable. It appears to me to be self evident that, if anything is taken, compensation should be assessed as at the date when it is

(1) (1883), CRIPPS ON COMPENSATION (8th Edn.) 906.

(2) (1892), CRIPPS ON COMPENSATION (8th Edn.) 916.

taken. But taking or acquisition under the Lands Clauses Consolidation Act 1845 involves a series of steps spread over a period of time and so it is necessary to determine at what stage the promoters can properly be regarded as having taken the land and the owner can properly be regarded as having had it taken from him.

In the nineteenth century the purchasing power of money remained fairly constant over long periods, otherwise consols would not have been held to be the safest possible investment. And there was seldom any long delay by the promoters in completing the acquisition of land after notice to treat had been served; counsel could not find any case in which the delay had exceeded two or three years. So from a practical point of view it did not much matter which stage in the process of acquisition was taken as the time as at which compensation should be assessed. It was convenient to take the date of the notice to treat, and from at least 1870 onwards it was generally assumed that this was the right date to take.

The first authority generally cited for the proposition that interests must be valued as at the date of the notice to treat is the judgment of SIR WILLIAM PAGE WOOD, V.-C., in *Penny v. Penny* (1). There an executor held a house on trust to permit the testator's sons to have the house at a low rent so long as they carried on the family business there. When the Metropolitan Board of Works served a notice to treat the sons were still carrying on the business and likely to go on doing so. The sons were held to be entitled to be compensated for their interest, but the executor sought compensation on the basis that the sons' interest should be disregarded and the executor should be regarded as free to deal with the property. This contention was of course rejected. In the course of his judgment SIR WILLIAM PAGE WOOD, V.-C., said:

"... I think the valuation ought to be made as at the time when the house was about to be taken, and should be made of the exact interest which the Plaintiff [the executor] would at that moment have had, assuming that the house had not been taken... The scheme of the Act I take to be this: that every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given. Any difference in the result which is due to the accident of the property being taken by a public body is not to be thrown into the compensation fund."

The essence of this decision was that the extent or quality of an interest to be compensated cannot be altered or increased by the giving of the notice to treat or the compulsory acquisition of that interest. No one would now doubt that. But this does not imply that the interest must be valued as at the date of the notice to treat, and it is to be observed that SIR WILLIAM PAGE WOOD, V.-C., did not say that serving the notice is or must be regarded as a taking of the property. He treated as identical "the time when the house was about to be taken" and the "moment when the notice to treat was given". If he had foreseen present conditions I think he would have used rather different language.

There is no indication in the later authorities of anyone having contended that any other date should be taken than that of the notice to treat. The appellants relied on *Bullfa and Merthyr Dare Steam Collieries* (1891), Ltd. v. *Pontypridd Waterworks Co.* (2), but it appears from the judgment of ROMER, L.J., in the Court of Appeal that it was not disputed that this was the proper date. They also relied on the judgment of SCOTT, L.J., in *Horn v. Sunderland Corp'n.* (3)

(1) (1868), L.R. 5 Eq. 227.

(2) [1902] 2 K.B. 135; *revid.* H.L. [1900-03] All E.R. Rep. 600; [1903] A.C. 426.

(3) 105 J.P. 223; [1941] 1 All E.R. 480; [1941] 2 K.B. 26.

where, obiter, he set out "the legal principles" including "(iii) It [i.e., the value] must be ascertained as at the moment when the notice to treat was given". But plainly he did not have in mind anything like recent conditions, for he said that the Act of 1845

"possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater. The other is that the legislation recognises only two kinds or categories of compensation to the owner from whom land is taken—namely, (i) the fair value to him of the land taken, and (ii) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection."

He would never have said that if he had foreseen that one day the application of his third principle would result in the owner only getting a sum equal to half his actual loss.

This "principle" was stated much earlier in *CRIPPS ON COMPENSATION* (2nd Edn., 1884), at p. 68:

"The notice to treat is so far binding on the owner, that it fixes the interest in respect of which he can claim compensation, and determines the time at which the value of that interest shall be considered for the purposes of the assessment of purchase-money or compensation. In other words, the subject-matter for which compensation has to be assessed cannot be varied after receipt of the notice to treat.

"In practice, it is generally agreed that the amount of compensation shall be assessed as from the date of the inquiry, or from the date when the promoters would take, or had taken, possession of the lands in question for the purpose of their undertaking; but if the claimant can prove that he has suffered loss between the time of his receiving notice to treat and his dispossession by the promoters, he is entitled to claim for it."

The authority given for the last sentence does not quite support it, but it is significant that LORD PARMOOR did not think that this principle completely prevents the claim from being increased by events subsequent to the notice to treat. And the preceding sentence shows that in practice it made little if any difference whether the valuation was as at the date of the notice to treat or of the valuation or of the dispossession.

I can find no substantial reason given for taking the date of the notice to treat other than that it was the most convenient date to take, and that it was so near to the date of the actual taking that assessment as at the date of the notice to treat would do no substantial injustice to either party. Moreover this so-called principle does not appear to have been applied to every element of the value of the land to the owner. It has certainly been regarded as applying to that element which consists of the market value of the land taken. But there is little or no indication that it was regarded as applicable to the other elements in an owner's claim. These might include costs of removal, loss of profit or other consequential loss and there appears to be no suggestion in the authorities that these elements in the value of the land to the owner must be valued as at the date of the notice to treat. The actual costs or losses following on actual dispossession have been taken, and that appears to be the accepted practice today with regard to claims under r. (6). But this would be quite illogical if it

were an absolute rule that the value of the land to the owner must be assessed as at the date of notice to treat, for it has been said again and again from an early date that there is only one subject for compensation—the value of the land to the owner. And it could not be right to value one element of the value to the owner, the market value of the land, as at one date, and to value the other elements, consequential losses, as at a different date. So it appears to me that the so-called principle rests on very unstable foundations.

We have to construe r. (5) of the Act of 1919. I think it clear that the natural meaning of “the basis of the reasonable cost of equivalent reinstatement” is that one envisages a reasonable owner re-instating himself in premises reasonably equivalent for his purpose as soon as, in all the circumstances, that is reasonably practicable, and awards to him as compensation such sum as will enable him to do that. But if it had been clearly established before 1919 that the proper basis for assessing the cost of re-instatement was the hypothetical cost as at the date of the notice to treat, then I would find it somewhat difficult to hold that r. (5) had altered the law, because I doubt whether it can be said that the words of r. (5) are incapable of having this meaning. I am therefore unwilling to decide this case without coming to some conclusion as to what the pre-existing law was.

If we are to consider the law as it was before 1919 I do not think that we can take re-instatement in isolation. On the one hand, the rule that the date of the notice to treat must be taken was generally stated as applying to all compensation, e.g.:

“The principle of compensation is indemnity to the owner, and the basis on which all compensation for lands required or taken should be assessed, is their value to the owner as at the date of the notice to treat . . .”

(CRIPPS ON COMPENSATION (5th Edn.), at p. 102.)

On the other hand, the principle underlying the rule was that the owner was to be compensated for his expulsion from the land taken, e.g., in the same edition of CRIPPS it is stated:

“The loss to an owner, whose lands are required or have been taken, omitting all questions of injury to adjoining lands, includes not only the actual value of such lands, but all damage directly consequent on the taking thereof under statutory powers.

“In *Ricket v. Metropolitan Ry. Co. (Directors etc.)* (1), there is a dictum of ERLE, C.J. (34 L.J.Q.B. 261), which expresses this principle: ‘As to the argument, that compensation is in practice allowed for the profits of trade where the land is taken, the distinction is obvious. The company, claiming to take lands by compulsory powers, expel the owner from his property and are bound to compensate him for all the loss incurred by the expulsion, and the principle of compensation then is the same as in trespass for expulsion, and so it has been determined in *R. (or Jubb) v. Hull Dock Co.* (2)’.”

The principle and the rule cannot be reconciled except on the basis that the total value to the owner at the date of the notice to treat is always substantially the same as the value at the date of the expulsion. For it cannot be said that the owner is in any way expelled from his land by the notice to treat. So the question is whether it is proper for this House to re-examine a judge-made rule of law based on an assumption of fact which was true when the rule was formulated but which is no longer true and which now in many cases causes serious injustice.

(1) (1865), 34 L.J.Q.B. 257; *affd.* H.L., (1867), 31 J.P. 484; L.R. 2 H.L. 175.

(2) (1846), 10 J.P. 835; 9 Q.B. 443.

The appellants argue that we cannot do this because, in at least three fairly recent Acts, Parliament has recognised the validity of the existing rule. Section 57 of the Town and Country Planning Act 1944, provides that:

"the value of any interest in land purchased pursuant to a notice to treat served at any time within the period of five years from the commencement of this Act . . . shall be ascertained by reference to prices current at the 31st day of March 1939, on the assumption that the interest had at that time been subsisting as it was in fact subsisting at the time of service of the notice to treat . . ."

Section 55 (2) of the Town and Country Planning Act 1947, provides:

"The value of any interest in land which is compulsorily acquired as aforesaid shall be ascertained by reference to prices current immediately before [7th January 1957], and for that purpose the interest shall be deemed to have been subsisting immediately before that day subject to all incidents to which it is subject on the date of the notice to treat . . ."

And s. 14 of the Town and Country Planning Act 1959, applies to notices to treat served before 6th August 1947, and provides that if the authority intends to proceed with the compulsory acquisition they must serve a notice of intention to proceed whereupon (s. 15 (1)) the owner may "elect that compensation in respect of the compulsory acquisition of that interest shall be assessed as if the original notice to treat had been served on 1st January 1958".

These provisions do show that Parliament (or the draftsman) must have thought that the law was that compensation was assessable on the basis of value as at the date of notice to treat. But the mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different. This has been stated in a number of cases including *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (1). No doubt the position would be different if the provisions of the enactment were such that they would only be workable if the law was as Parliament supposed it to be. But in my view all that can be said here is that these enactments would have a narrower scope if the law was found to be that compensation must be assessed at a date later than that of the notice to treat. I do not think that that is sufficient to preclude your Lordships from re-examining the whole matter.

Then there is the importance of not upsetting existing proprietary or contractual rights. We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that the rule as to the date of the notice to treat is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed. Here there appears to me to be little or no chance that by re-opening the whole matter we would alter the future operation of existing vested rights.

The only other difficulty is to find the right date for the assessment of compensation. No stage can be singled out as the date of expropriation in every case. Sometimes possession is taken before compensation is assessed. Then it would seem logical to fix the market value of the land as at that date and to take actual consequential losses as they occurred then or thereafter provided that the dispossessed owner had acted reasonably. But if compensation is assessed before possession is taken, taking the date of assessment can I think be justified because then either party can sue for specific performance and the promoters obtain a

(1) [1952] 1 All E.R. 531; [1952] A.C. 401.

right to the land, as if there had been a contract of sale at that date. In cases under r. (5) I have already said that that rule appears to point to assessment of the cost of re-instatement at the date when that became reasonably practicable.

I do not think that altering the existing rule would necessitate overruling any of the decisions cited except *Phoenix Assurance Co. v. Spooner* (1). There buildings had been destroyed by fire between the service of the notice to treat and the acquisition of the land by Plymouth Corporation. The owner recovered the amount of the fire damage under a policy of insurance, and the real question was whether the corporation were bound to pay the value of the subjects as at the date of the notice to treat. BIGHAM, J., held that they were: it followed that the owner suffered no loss from the fire—the loss fell on the corporation—and so the insurance company were entitled to recover the sum which they had paid to the owner. This decision would be right if the rule is that property must be valued as at the date of the notice to treat. But it illustrates one of the disadvantages of that rule. It seems to me wrong that the risk should pass at the date of the notice to treat although the promoters or acquiring authority then acquire no right or interest in the property; it would mean that the owner although still in full control would cease to have any duty to preserve the property or any incentive to insure it. It does not at all follow from the fact that the owner cannot so act as to increase the burden on the promoters, that the burden on the promoters may not be diminished by events later than the notice to treat. I would overrule the decision.

If the views which I have expressed are accepted the result is that the present practice with regard to r. (2) is wrong, that what I understand to be the present practice with regard to r. (6) is correct, and that under r. (5) the respondents are entitled to the larger agreed sum. I would dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: The People's Chapel, a place of worship in Great King Street, Birmingham, has been compulsorily acquired by the city of Birmingham. It lies within a large area of 981 acres which the corporation, as far back as February 1946, decided to purchase for purposes of redevelopment. It was manifest that redevelopment of the whole area could not, and would not, and was not intended to, take place at once; nor as to the whole area all at the same time. It was a long-term project. It is agreed that in due course the trustees of the chapel would wish to build a new chapel to take the place of the old. It is agreed that the date when they could reasonably have begun to build one was 30th April 1961. It is agreed that the proper amount of compensation payable in relation to that date is £89,575. It is agreed that the trustees were entitled to have their compensation for the compulsory acquisition of their chapel assessed on the basis of the reasonable cost of equivalent re-instatement. Yet it has been argued that the trustees should not have the £89,575 but should only have £50,025 because that is what the proper compensation would have been if it were payable in relation to a date 14 years earlier, i.e., 14th August 1947, which is the date when a notice to treat is deemed to have been served.

Each of the two amounts includes a sum of £5,025, which was an agreed sum payable under r. (6) as compensation for disturbance; it represented the cost of removing the organ and the pews and certain fittings and fixtures from the old chapel which was acquired to the new one that was built.

All the material facts were set out in an agreed statement of facts, and the sole question before the Lands Tribunal (who stated a Case pursuant to s. 3 (4) of the Lands Tribunal Act 1949, and R.S.C., Ord. 61) was whether the relevant date for assessing compensation was the date at which the respondents might

(1) [1905] 2 K.B. 753.

reasonably have begun re-instatement or was the date on which notice to treat was deemed to have been served.

In my view, an application of r. (5), which, as is agreed, is the rule which governs this case, leads irresistibly to the conclusion that the respondents were entitled to receive £89,575. The argument to the contrary had as its inspiration the thesis that compensation has always been stated and held to be assessable by reference to values existing at the date of a notice to treat. The validity of any such thesis has as a consequence been directly challenged.

Before examining the wording of r. (5) it is to be observed how irrational and, indeed, unjust it would be to take 1947 figures in the present case. After the corporation sealed their compulsory purchase order on 15th February 1946, there was a public inquiry. It took place in July 1946. At the inquiry it was stated that a new site would be offered by the corporation for a new chapel. Indeed, it is clear that both the corporation and the trustees proceeded on the basis that the corporation would at some later time allocate sites for churches. It is an agreed fact that for a period of ten years (i.e., between 1947 and 1957) the corporation concentrated on the purchase of slum houses and on starting their redevelopment programme. It was recognised that until their redevelopment scheme was well advanced new sites for churches could not be offered by the corporation. In a letter written by the town clerk to the trustees of the chapel nearly nine years after the date of the deemed notice to treat, i.e., on 1st August 1956, it was stated that, although the majority of the properties which were subject to the compulsory purchase order had been purchased, it was the corporation's policy to defer the acquisition of certain business and industrial premises until nearer the time when they would be required for redevelopment purposes. The letter was written to the trustees to "remind" them of the existence of the ageing deemed notice to treat. It was confirmed that the corporation "still" intended to take the necessary action for the purchase of the property "in due course". The trustees were told that "when such action is commenced" notice would be sent. Over two years later a site for the erection of a new people's chapel was allocated by the corporation. After the site was accepted (in September 1959) by the church authorities they proceeded to plan the new church and to instruct architects and to obtain planning permission. It was agreed that the date on which building work might reasonably have been begun was 30th April 1961.

On these facts, none of which is in dispute, it would, I think, be a shocking thing if any principle of law could be invoked leading to the result that the trustees who had to spend nearly £90,000 were only to receive about £50,000 on the basis that that was what they would have spent if building work had begun in August 1947. But they could not have begun to build on 14th August 1947; a decision to build could not be made immediately after a notice to treat and in the nature of things plans could not forthwith be prepared. Furthermore, the trustees were to have a site from the corporation. They were not offered one until 1958. It was one that they had to purchase from the corporation. Its price is included in the £89,575. And after a site is available plans have to be made and permits obtained. In truth, matters proceeded at the pace that suited the corporation.

By a strange irony we are dealing with a case where the corporation used the "expedited completion procedure", yet to a great extent they contemplated delayed completion; their plans involved that purchase of the respondents' property would only be "in due course"; the time for payment for it would be on some uncertain future date; payment would be on the basis of the

reasonable cost of equivalent re-instatement. Yet it is said that such future payment need only be measured by the out-of-date prices ruling at some date when re-instatement was not contemplated and was not desired and was not possible. If some inflexible general rule is said to give foundation for such topsy-turvy injustice then it seems high time to consider whether it can bear exposure to the light of reason.

The present case is one in which it is admitted that r. (5) applies. The language of the rule points to the matters about which the official arbitrator, formerly, and now the Lands Tribunal must be satisfied in deciding whether the rule is to be applied. The tribunal must be satisfied that the land is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose. The tribunal must be satisfied that but for the compulsory acquisition devotion to such purpose would have continued. Then the tribunal has to consider whether it "is satisfied that reinstatement in some other place is bona fide intended". If satisfied as to these matters (which must be questions of fact) then the tribunal is empowered to assess compensation "on the basis of the reasonable cost of equivalent reinstatement". The language that is used seems to contemplate a hearing before the date when equivalent re-instatement takes place; but, whether this be so or not, the compensation that may be assessed is to have relation to the "reasonable cost" incurred in providing equivalent re-instatement. That, in my view, points to actual cost—provided always that it is reasonable cost: it must be what reasonably it would actually cost to secure equivalent re-instatement; if there is unreasonable delay then a figure as claimed may not be the reasonable cost. If, however, facts show ample reason why time should have elapsed since the date of a notice to treat then I can see no reason why, on the wording of r. (5) compensation should not be assessed on the basis of actual reasonable cost of equivalent re-instatement at prices ruling at the actual date when reasonably and properly the cost has been or was being or was to be incurred.

The decision of the Lands Tribunal in the present case was given on the basis that it is an established practice of the tribunal to follow previous decisions of the tribunal given on points of law. The decision in *Aston Charities Trust, Ltd. v. Stepney Borough Council* (1) (which was given on 1st January 1952), was accordingly followed. In that case the premises of the trust (whose objects were restricted to religious and charitable purposes), were compulsorily acquired. The notice to treat was dated 26th February 1946. Possession of the premises was taken by the acquiring authority on 8th July 1946. The premises and the neighbourhood in which they were situated had suffered war damage; as a consequence there was perforce a virtual cessation of the trust's activities; some part of the premises that could be used was temporarily let for storage purposes (a use that was continuous at the date of the notice to treat) but as from the date of the notice to treat a small part of the premises was still occupied by the trust. The first and main issue was whether, having regard to the particular facts, it could be said that the property was "devoted" and, but for the compulsory acquisition, would continue to be "devoted" to the purposes of the trust so as to make r. (5) applicable. It was held that r. (5) did apply, and that the temporary occupation referred to had not deprived the property of the special qualities which justified the application of the rule. Then the question arose whether the "reasonable cost" of equivalent re-instatement under r. (5) meant—

(1) (1952) 2 P. & C.R. 289; *affd.* C.A. 116 J.P. 441; [1952] 2 All E.R. 228; [1952] 2 Q.B. 642.

"the expense to be incurred at the time of the reinstatement, or the cost of such reinstatement calculated upon the basis of prices ruling at the date of the service of the notice to treat."

Holding that the cost of re-instatement should be calculated at prices ruling at the date of the notice to treat, the tribunal said that no explanation had been given why a period of nearly five years had elapsed between the date of the notice to treat and the reference to the tribunal. It was said that the proper cost was that based on the prices likely to apply to a notional contract for the construction of alternative premises entered into on the date of the notice to treat with probably a clause for adjustment of prices during the period of construction. My Lords, I cannot regard the decision as affording satisfactory guidance in other cases. The facts, furthermore, were wholly different from those in the present case. In the *Aston* case (1) the notice to treat (in February 1946) was followed by a taking of possession some five months later. In the present case the corporation did not contemplate taking possession for years and years. The time to arrange "equivalent reinstatement" would reasonably bear relation to the time "in due course" when the corporation would wish that the property being acquired should be vacated so that possession of it should be taken.

I can see neither reason nor justice in the view that the cost of re-instatement under r. (5) should be calculated at prices ruling at the date of a notice to treat. It is to be observed that, whereas under r. (2) compensation is based on the "value" of land, i.e., the value to the owner of what is taken from him, under r. (5) compensation is based on a different concept, i.e., the "cost" of something that is to take the place of what is taken away. That cost must, however, be the reasonable cost. The reasonable cost, depending on the facts of particular cases, will be the actual reasonable cost which a claimant has incurred or can be expected to incur; it will be such cost at the time when equivalent re-instatement reasonably does or should take place. On the wording of r. (5), which admittedly applies, and the conditions of which were admittedly satisfied, and the discretionary power of which should admittedly be exercised, I conclude that the total proper amount of compensation should be assessed at £89,575.

On behalf of the corporation it was contended that there is a general rule, supported by authority and recognised by certain enactments, that compensation is to be assessed by reference to interests in land as existing at the date of the notice to treat and by reference to the value that they then had. It was contended that such general rule was established prior to the Acquisition of Land (Assessment of Compensation) Act 1919 and was not altered by it; that r. (5) merely provides a particular method for assessing in some cases the value of what has been acquired; that as the date of the notice to treat governs the assessment of value, both generally and in r. (2) cases, so under r. (5) the value of the land acquired must be assessed on the basis of the reasonable cost of equivalent re-instatement, taking prices and costs ruling at the date of the notice to treat.

The basis of these contentions calls for examination. The question can be asked—why should compensation in all cases be assessed by reference to values or costs as at the date of the notice to treat? If possession is soon to be taken, or compensation soon to be assessed, then it is unlikely that values will have varied in an intervening period. But if someone is having his land compulsorily taken from him, it is likely that any alternative arrangements that he makes will be made in relation to the time when his land is actually taken or in relation to the time when compensation is actually payable. Someone who receives r. (2)

(1) (1952) 2 P. & C.R. 289; *affd.* C.A. 116 J.P. 441; [1952] 2 All E.R. 228; [1952] 2 Q.B. 642.

compensation may wish to buy other land, or he may wish to invest the sum he receives. He will buy or he will invest when he receives the price of what he has been forced to sell. If the acquiring authority is well content that a period of hibernation should follow the notice to treat, it will be only reasonable if compensation is assessed on the basis of values ruling when the period comes to an end. A notice to treat does not establish the relation of vendor and purchaser between the acquiring authority and the owner. It does not transfer either the legal or the equitable interest to the acquiring authority. It informs the owner that the land is to be taken and informs him that the acquiring authority are ready to negotiate with him as to the price of the land that they will purchase and that he must sell and as to compensation for damage that may be payable. It makes a demand for particulars of estates and interests and of claims. (See s. 18 and s. 21 of the Lands Clauses Consolidation Act 1845.) But if the acquiring authority intend to let years go by before they want possession and before they agree a price or have it assessed, it would be irrational if, after the years have passed, they could say: We will take your land now but we will only give you now what we would have had to give you years ago if we had then taken your land.

There is no statutory provision to the effect that compensation must be based on values ruling at the date of a notice to treat. Section 63 of the Act of 1845 is in these terms:

"In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

It was held in 1887 in *Inland Revenue Comrs. v. Glasgow & South Western Ry. Co.* (1) that the value of the land is its value to the person who is compelled to sell; and in that case compensation was awarded under three heads, being: (a) the value of the land acquired; (b) the value of buildings, machinery and plant; and (c) compensation for loss of business. It is, I think, well established that the value to be ascertained is the value to the seller of the property and not the value to the buyer.

But why should the value of the land be other than the value either at the date when possession is taken or the value at the date when the valuation is being made? What justification can there be for taking an out-of-date valuation? The word "compensation" would be a mockery if what was paid was something that did not compensate. Under r. (2) the value of land is to be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise. That, in my view, denotes the amount which a willing seller would realise either if such a sale took place at the date when possession is taken or if such a sale took place at the date when compensation is being assessed.

It is rational to hold, as it has been held, that after the acquiring authority have specified in the notice to treat the land which they are empowered to acquire the owner cannot by altering the land or creating new interests in it increase the burdens of the acquiring authority as regards the compensation

to be made (see *Re Marylebone (Stingo Lane) Improvement Act, Ex p. Edwards* (1) and *Mercer v. Liverpool, St Helens & South Lancashire Ry. Co.* (2)). But it does not follow from this that values must be ascertained and assessed as at the date of a notice to treat. It is said that authority for such a view is to be found in the judgment of SIR WILLIAM PAGE WOOD, V.-C., in *Penny v. Penny* (3) in 1868. In that case a testator had certain leasehold premises in which he carried on business with two of his sons. By his will he left the leasehold premises to his executors on trust to permit the two sons to occupy the premises so long as they or one of them continued to carry on the business and paid a certain rent, which was a low rent, to the executors. If the business was not carried on by the sons, or either of them, then the trustees were empowered to sell the leasehold interest. The testator died in May 1862, and the surviving executor proved the will in July 1862; the sons carried on the business. On 8th May 1866, the Metropolitan Board of Works served on the executor a notice to treat for the purchase of the premises. The executor sent in a claim. A notice to treat was also served on the two sons who were continuing to carry on the business. They also sent in a claim. The executor's claim went before a jury. The jury gave an award on 5th March 1867, of a sum which was assessed as the value of the residue of the term vested in the executor assuming a rack rent and disregarding the right of the two sons to occupy the premises. The claims of the two sons were referred to arbitration and an amount was awarded them by an award dated 26th April 1867. It included a sum for trade compensation and a sum for their interest in the leasehold. The metropolitan board proposed to deduct the latter sum from the amount of the award in favour of the executor and to pay him the balance. He would not agree. The matter came before the court on the petition of the executor who asked for the direction of the court. It seems clear that it would not have been right to require the board to pay both sums in full. In the result the court held that the two sons were entitled to retain their award but that the executor's claim should be dealt with afresh. The whole reasoning of the judgment was that the respective awards should have regard to the interests of the respective claimants as they existed. The sons had their right to be in the premises at a low rent. The executor had the residue of a lease which could be valuable, but in arriving at a valuation it would be wrong to disregard the fact that so long as the sons exercised their rights the executor's interest was worth less than the full and fair value of the property itself per se. SIR WILLIAM PAGE WOOD, V.-C., pointed all this out. But one sentence has been taken from his judgment as reported in the Law Reports and has been the foundation of statements that valuations are to be made as at the date of notices to treat. In the early part of the judgment and before the sentence in question the Vice-Chancellor had referred to the nature of the interest of the two sons and to their claim and had made it clear that the value of the executor's interest in the lease was diminished during such period as the two sons chose to occupy the premises and carry on the business. It would not be right to treat the executor's interest as having been increased by the fact that the notice to treat was served.

"The valuation [of the plaintiff's (the executor's) interest] ought to be made as at the time when the house was about to be taken and should be made of the exact interest which the plaintiff would at that moment have had assuming that the house had not been taken."

The two sons had continued to occupy. Therefore, the executor was not entitled

(1) (1871), L.R. 12 Eq. 389.

(2) 68 J.P. 553; [1904] A.C. 461.

(3) (1868), L.R. 5 Eq. 227.

to the whole beneficial rent. The two sons were entitled to say that, but for the acquisition, they would have gone on occupying and trading. The report does not set out the actual date when possession was taken but I would infer that there was no long delay after the dates of the notices to treat. The house and premises were being acquired so that a road could be constructed from Blackfriars to the Mansion House. In any event, it is very unlikely that values would vary as between the dates of notices to treat and the date of taking possession and the date when a jury or an umpire determined the figure of valuation. No question arose—or, indeed, was under consideration—concerning any possible variations in value as between any of the dates. What the Vice-Chancellor was so clearly and logically laying down was that the acquiring board must not be made to pay twice over:

“But it does not follow that because the taking of this property determines the Defendants’ interest, therefore the reversioner has a right to say that the Board must pay twice over for the same property. For that is what the argument comes to, when it is contended that the Board must not only pay those who had got the lease at a low rent, and who were entitled to hold it during their lives and the life of the survivor, so long as they should carry on the business, but that they must pay the reversioner more, in consequence of their having enriched the reversion by destroying the business—in other words, for having handed over the benefit of their acts to the reversioner.”

Then follows this passage:

“That is not at all the scheme of the Act. The scheme of the Act I take to be this: that every man’s interest shall be valued, *rebus sic stantibus* just as it occurs at the very moment when the notice to treat was given.”

Having regard to the whole context and reasoning and to what had previously been said, I should have thought that what was meant was that the interests existing at the dates of notices to treat should be recognised. So far as anything was said in regard to the time to be taken for valuation purposes, what the Vice-Chancellor said was that it was the time “when the house was about to be taken” which would be the time when possession was taken. The notices to treat had been given on 8th May 1866. The valuations were made in March and April 1867. I would suppose that if, after 8th May 1866, there had been a period of delay before any step at all was taken and if during that period the two sons had decided for their own personal reasons to give up business (and therefore occupation) the result would have been that they could not have claimed compensation.

The case is not only reported in the Law Reports. It is also reported as follows: 37 L.J.Ch. 340; 18 L.T. 13; 16 W.R. 671. It is, I think, significant that in each one of these reports the reference is not to “the very moment when the notice to treat was given” as in the Law Reports but to the moment of valuation. Thus in 16 W.R., at p. 673, are the words:

“The scheme of the Act I take to be this: that every man’s interest should be taken *rebus sic stantibus* just as it occurs at the very moment when the valuation is to be made.”

In 37 L.J.Ch., at p. 344, the sentence is given:

“The scheme of the Act was that every man’s interest must be valued *rebus sic stantibus* just as it occurred at the very moment when the valuation was to be made . . .”

In 18 L.T., at p. 14, the sentence is given:

"I consider the scheme of the Act of Parliament to be that every man's interest shall be valued *rebus sic stantibus* just as it occurs at the moment when a valuation is to be made."

The reporters were in each case different.

It is also of interest to note that the sentence which in the *LAW REPORTS*, as I have set out above, is recorded as stating that the valuation—

"ought to be made as at the time when the house was about to be taken and should be made of the exact interest which the plaintiff would at that moment have had assuming that the house had not been taken"

is recorded in the *LAW TIMES* in the sentence "To me it appears that the exact time of valuing these interests is when the public body are about to take down the house". If I am right in inferring that possession was taken some time after the notices to treat, the indications are, although the direct point was not in issue, that the date when possession was taken (if it preceded the actual date when valuation was being made) would be the date as at which valuation should be made.

The whole point of the decision in that case was that in valuing the leasehold interest of the executor full regard had to be paid to the fact that the sons' rights undoubtedly existed and that because they existed the value of the interest of the executor was depreciated. In my view, the case is no sort of authority for the proposition that a notice to treat is so far binding that it always determines the time by reference to which an interest being acquired is to be valued.

A case may be supposed where land subject to a lease is being acquired. Suppose that notices to treat are served on the owner and on a lessee whose lease has two years to run, and suppose that nothing is done for a period of three years but that compensation is then to be assessed by the Lands Tribunal. In my view, the lessee would have no claim then to receive compensation.

I consider, therefore, that the date by reference to which the value of land should be assessed under r. (2) is the date when the value is being agreed or is being assessed by the appropriate tribunal or, if it is earlier, the date when possession was taken.

It must be acknowledged that it has been stated, both in textbooks and in authorities, that when there is acquisition for public purposes value is to be ascertained as at the date of the notice to treat. In *Horn v. Sunderland Corpn.* SCOTT, L.J. (1), cited the *LAW REPORTS* version of what SIR WILLIAM PAGE-WOOD, V.-C., said in *Penny v. Penny* (2); GODDARD, L.J., said that it had always been the law that value was to be ascertained as at the date of the notice to treat. But no point was in issue in that case as to any competition between different dates for valuation. The law, as it has been stated to be, formed the basis of the decision of BIGHAM, J., in *Phoenix Assurance Co. v. Spooner* (3). BIGHAM, J., said that Mrs. Spooner had "a right to be paid by the corporation [i.e., the Plymouth Corporation who had served a notice to treat on her before a fire occurred on the property being acquired] the value of the property as at the date of the notice to treat—that is to say, the value before the fire". As, in my view, valuation does not have to be made as at the date of a notice to treat I consider that that case should have been decided the other way.

It has been pointed out that after a notice to treat has been served on him it is always open to an owner then to take steps to have compensation assessed. That is perfectly true. But he is not obliged to follow that course. An owner who is

(1) 105 J.P. 223; [1941] 1 All E.R. 480; [1941] 2 K.B. 26.

(2) (1868), L.R. 5 Eq. 227.

(3) [1905] 2 K.B. 753.

unwilling to part with his property might find that an acquiring authority had abandoned the scheme on which their rights of acquisition were based and had lost their rights (see *Grice v. Dudley Corpn.* (1)). In the present case if there had been an assessment of compensation, on the basis of r. (5), in 1947 I consider, in agreement with the reasoning of SALMON, L.J., in his powerful judgment, that the tribunal would have been faced with a task of appalling difficulty; they would have had to award such a sum as would cover the future reasonable cost of acquiring suitable land at such future date as they decided (or guessed) would be the date when re-instatement could reasonably begin and also a sum that would cover what would in the future be the reasonable cost of equivalent re-instatement at what they considered (or guessed) would be the costs and prices ruling at such date and also a sum to cover (under r. (6)) what would be reasonable compensation for the disturbance that would at such future date occur.

An argument was developed to the effect that a consideration of s. 57 of the Town and Country Planning Act 1944, of s. 50 and s. 55 of the Town and Country Planning Act 1947, and of s. 14 and s. 15 of the Town and Country Planning Act 1959, shows that they were enacted on the assumption that the value of land is or has been ordinarily assessed by reference to the date of a notice to treat. I think that that does appear. But Parliament has never so enacted, and I do not think that we are precluded from demonstrating that the assumption need not be made.

I would dismiss the appeal.

LORD UPJOHN: I have had the opportunity of reading in advance the speeches of my noble and learned friends, LORD REID, LORD MORRIS OF BORTH-Y-GEST and LORD DONOVAN. I agree with them, and they cover the whole ground so completely that I cannot usefully add anything. I would dismiss the appeal.

LORD DONOVAN: In any developing community there must be power to take land from private owners for public purposes; and in a society where private ownership of land is permitted, justice requires that compensation should be paid for such taking. When this compensation takes the form of a monetary payment, the date which at once suggests itself as the date when values should be ascertained and compensation computed is the date of the taking. It is then that the private owner sustains his loss; and it is at that date, one would have thought, that the amount of his loss should be calculated and at prices then prevailing. Yet hitherto in this country it seems not to have been so; and one cannot help but wonder why. To seek a solution to the question one goes to the legal provisions which lay down the procedure normally to be followed when some person (I will call him the promoter) is authorised compulsorily to acquire the property of another. They are to be found principally in the Land Clauses Act 1845.

Section 18 of that Act requires the promoter to give notice of his intention to the owner, and by such notice the promoter is to demand from the owner particulars of his interest in the property and the claim he makes in respect of it. The notice is to state the particulars of the land which the promoter requires and to say that the promoter is willing to treat for its purchase. This has become known as the "notice to treat", a term which suggests that it imposes some kind of obligation on the owner to come to the bargaining table. In fact it does nothing of the sort; and the notice would be more accurately described as a "notice of willingness to treat". There is no compulsion on the part of the owner to send in particulars of his interest; and no compulsion on him to state what his claims are.

There are, however, other provisions of the Act which enable a promoter to overcome any such lack of response and, in due course, get possession of the land,

Since, however, the notice to treat does specify the particulars of the land required, it has long been settled that the owner cannot deal with the land thereafter in such a manner as to increase the burden of compensation falling on the promoter. This is reasonable enough. In the words of the textbook writers the notice to treat fixes the interest which is to be required. It is also, of course, an essential preliminary step in the process of compulsory acquisition. Normally negotiations as to the amount of compensation will follow; disputes about it will be resolved; and steps may be taken by the promoter against an obstructive owner. Yet it has been consistently assumed for over a century, until the present case reached the Court of Appeal, that the notice to treat also fixed the day as on which the property eventually taken was to be valued for the purposes of calculating the compensation to be paid. I find it difficult to discover why. If the notice operated to transfer some kind of equitable title to the land, or even to deprive the owner of power to alienate the property, one could understand the assumption. But it does neither of these things. Moreover, the Act of 1845 is replete with references to "compensation" and to "compensation for lands taken" and the more natural assumption would be that such compensation would reflect the value of the land taken at the time it was taken, and not at some earlier date.

It is, however, a feasible explanation that during the last century the "taking" followed the notice to treat without any long delays intervening, and that in days when values were stable, there was no real point in an owner contending that the value of the land should be assessed for the purpose of compensation as at the date when it was taken. So that what began as a practice which no owner had sufficient interest to challenge, has become hardened over the years into an alleged rule of law.

Yet in the differing circumstances of today the rule can operate to do great injustice. Take the present case. The compulsory purchase order which operates as a notice to treat was served on the owners on 14th August 1947. But the promoter did not take the property till 24th June 1963, by which time values had greatly increased. The delay was not the fault of the promoter—the Corporation of Birmingham. It was taking over no less than 981 acres in the city for redevelopment, an operation which was bound to take years to complete. If it may now acquire the owner's property at 1947 values, it is almost a mockery to describe what it will pay as "compensation".

What, then, is the legal justification for the argument? Counsel for the appellants in his able address summarised it thus. The notice to treat, while it transfers no proprietary rights in the property, nevertheless creates new legal rights in both the promoter and the owner. The promoter is absolved from having to pay higher compensation because of any improvements in the land effected by the owner after the date of the notice to treat, or because of any new interests in the land which the owner, after the same date, creates. Under the circumstances specified in s. 85 of the Land Clauses Act 1845, the promoter can enter on the land even before compensation is paid. Damage to the land after the date of the notice to treat will not decrease the compensation payable to the owner. These and cognate considerations justify the conclusion that compensation should be based on the value of the property as at that date; and this has been recognised not merely in a series of judicial decisions but in three Acts of Parliament [Town and Country Planning Acts of 1944, 1947, 1959].

The contrary argument is based on the language of the Land Clauses Act, and on the circumstances that the notice to treat effects no change of proprietorship

whether legal or equitable. It is simply notice of an intention to take the land. When this is eventually done then under the Land Clauses Act "compensation for the purchase or taking" is to be paid. What grounds are there for selecting some date prior to the taking for assessing the value of the land for the purposes of compensation? Those suggested by the appellants, with the exception of the argument founded on subsequent Acts of Parliament, are brittle compared with the brute fact that compensation, if the notice to treat is treated as fixing the governing date, will not today in many cases be compensation but part confiscation. In some cases, moreover, it may be compensation plus a quite unjustified profit to the owner, as where notice to treat is served in respect of a leasehold property which is not taken till several more years of the leasehold term have expired. On the appellants' argument the owner must still be paid for the term which existed when the notice to treat was served, notwithstanding that he may have enjoyed several more years of the lease.

The three Acts of Parliament which have been relied on by the appellants are the Town and Country Planning Acts of 1944, 1947 and 1959. The effect of the particular sections in point has been set out in the speech of my noble and learned friend, LORD REID, and I need not repeat it. It is a trite observation that Parliament does not change the existing law simply by betraying a mistaken view of it. It would be a very different state of affairs if Parliament in effect said that some existing practice should be treated as being and as always having been the law, and then proceeded to enact some new provisions on that basis. Parliament would not, I suppose, normally be so explicit as regards the existing practice, and the courts would have to decide whether the language of the new provisions necessarily imported the translation into law of the practice. In the present case I am clear that this cannot be said to be the effect of the provisions relied on by the appellants.

Under the Act of 1845 compensation for the compulsory taking of land included re-imbursement of the loss caused to the owner by his expulsion. That loss was not assessed by doing some imaginary calculation as at the date of the notice to treat. It was an actual loss sustained later when the owner had to go; and even though it might in part be a loss of future profits it would be assessed on the basis of data existing at the time of assessment. The payment for this "disturbance", as it is called, has been held to be all part of the value of the land taken, and accordingly liable to ad valorem stamp duty as on a conveyance of land (*Inland Revenue Comrs. v. Glasgow & South Western Ry Co. (1)*). It follows that even on the appellants' argument there was this exception to the rule that the owner's loss had to be valued as at the date of notice to treat. Counsel for the appellants met this situation by denying the exception. He said that, although the cost of disturbance had to be ascertained at some later date, the resulting figure was simply a measure of the loss to be regarded as sustained as at the date of the notice to treat. I do not share this view, and regard it as unreal.

I need not canvass the authorities which are reviewed by others of your Lordships. On the whole of the argument and after considering all the material put before us, I am of the opinion that the contention of the appellants that the date of the notice to treat is the date when values are to be ascertained for the purpose of compensation is invalid; and that the true date for such purpose is the date when the title to the property passes or compensation is agreed or paid. It may be that these dates will frequently coincide, and unlikely that there will be much difficulty in practice in determining the relevant date. The guiding principle should be, I think, that the date when the promoter becomes the owner of the property, whether in law or in equity, in place of the expropriated owner, or enters into

(1) (1887), 12 App. Cas. 315.

possession of it, is the date according to which the necessary values should be ascertained. I also agree that the decision in *Phoenix Assurance Co. v. Spooner* (1) should be overruled. It is now necessary to say a few words about the Acquisition of Land (Assessment of Compensation) Act 1919, which amended the Land Clauses Act 1845 in certain respects. I need refer only to s. 2 which sets out the rules to be observed in future for assessing compensation.

Two of these rules are immediately relevant. Rule (2) provides that the value of land shall be taken to be the amount which it might be expected to realise in the open market if sold by a willing seller. Rule (5) deals with land devoted to a purpose of such a nature that there is no general demand or market for the land for that purpose. Where such land is compulsorily acquired, and but for such acquisition would be continued to be devoted to the same purpose, then if the official arbitrator is satisfied that "reinstatement in some other place is bona fide intended" the compensation is to be differently assessed. It is to be "the reasonable cost of equivalent reinstatement."

It is common ground that in the present case compensation is assessable under this rule; and the argument could have been confined to its effect—as indeed it appears to have been before the Lands Tribunal. But in the Court of Appeal the appellants submitted that since the established date at which value had to be ascertained for cases falling under r. (2) was the date of the notice to treat, logic and consistency required that the same date should apply to cases falling under r. (5). In other words, the "cost of equivalent reinstatement" must be ascertained according to prices ruling as at the date of the notice to treat. The respondents' answer to this contention was to challenge the major premise on which it rested; and thus both the Court of Appeal and your Lordships have had to consider the validity of the present practice in r. (2) cases; whereas otherwise the true effect of r. (5) alone might have had to be determined. This is not said by way of criticism. The wider question would at some time no doubt have had to be considered in another case; and the contention based on the practice under r. (2) was perfectly legitimate (although, as I think, mistaken) from the appellants' point of view.

Having rejected it there is little that I need say with regard to r. (5). The broad purpose of the Act is clearly to give to the respondents the cost of replacing the church with a like one elsewhere. That being so, "replacement" would be a more apt word than "reinstatement" for re-instatement is the one thing that is not going to happen. It is agreed in the present case that replacement could not have been reasonably begun before April 1961. Why, then, should the cost of doing so not be assessed as at that date? The answer given by the appellants is that the purpose of the Act is to give compensation for the thing taken, that the established rule is to assess this compensation at prices ruling on the date of the notice to treat, and that there is no difference in this respect between cases falling under r. (5) and cases falling under r. (2).

With the rejection of the "established rule" the answer loses its validity; but it becomes necessary to say at what date the reasonable cost of equivalent re-instatement in r. (5) is to be ascertained. I agree that it should be the earliest date when the owner of the property taken could reasonably have begun replacement.

I do not attempt a definition of "equivalent reinstatement". The matter was canvassed in argument and the argument revealed divergent views. In the case of the compulsory acquisition of a church which was in the heart of a city

(1) [1905] 2 K.B. 753.

and which had seating capacity for a congregation of 500, counsel for the appellants maintained that the new church on the outskirts of the city must have the like capacity, even though it might be known that the maximum congregation would be 200. Counsel for the respondents on the other hand, considered that in such circumstances a new church on the outskirts with a capacity for 200 would be equivalent re-instatement. The issue does not arise for decision here; there is no dispute on the point, but only as to the figure which is to be taken as the reasonable cost of what is agreed to be equivalent re-instatement. I therefore say no more about it. I also would dismiss the appeal.

LORD WILBERFORCE: I have had the benefit of reading in advance the opinion of my noble and learned friend, LORD REID. I agree with it and would dismiss the appeal.

Solicitors: *Sharpe, Pritchard & Co.; Ellis & Fairbairn.*

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND WILLIS, J.J.)

April 29, 1969

SOLESBURY v. PUGH

Road Traffic—Driving with blood alcohol proportion above prescribed limit—Specimen of blood—Failure to provide—"Reasonable excuse"—Arm selected as site by doctor—Defendant's refusal to supply except from big toe—Road Safety Act, 1967, s. 3 (3).

By s. 3 (3) of the Road Safety Act, 1967, a person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under s. 3 is guilty of an offence.

In relation to a specimen of blood, the word "requirement" in s. 3 (3) relates to a requirement by a doctor exercising his medical skill and experience as to the site from which blood is to be abstracted. Where, therefore, a doctor had requested the respondent to provide a specimen of blood from his arm and the respondent refused to provide a specimen otherwise than from his big toe,

HELD: this was an unreasonable refusal by the respondent and the respondent was guilty of an offence against s. 3 (3.)

CASE STATED by Burnham, Buckingham, justices.

An information was preferred by the appellant, Jonathan Solesbury, against the respondent, David Colvin Pugh, charging him with failing, without reasonable excuse, to provide a specimen of blood or urine for a laboratory test contrary to s. 3 (3) of the Road Safety Act 1967. The respondent pleaded not guilty to the charge, and the justices came to the conclusion that there was no evidence that he had failed to provide a specimen and dismissed the charge. The appellant appealed.

M. C. B. West for the appellant.

G. D. Flather for the respondent.

MELFORD STEVENSON, J.: This is a prosecutor's appeal by way of Case Stated against the dismissal of a complaint by the justices for the petty sessional division of Burnham in Buckinghamshire in respect of their adjudication



at Beaconsfield on 17th September 1968, when the respondent, David Colvin Pugh, appeared before them charged with the offence of failing, without reasonable excuse, to provide a specimen of blood or urine for a laboratory test, that is the offence for which provision is made by s. 3 (3) of the Road Safety Act 1967. To that charge the respondent pleaded not guilty and the justices found the following facts. On 31st August at 12.05 a.m. the respondent was driving his motor car at Chalfont St. Peter with no rear lights, and the appellant, a police constable, suspecting that he was committing a traffic offence while his vehicle was in motion, stopped the car and requested the respondent to supply a specimen of breath. This the respondent refused, and the constable, having reasonable cause to suspect that he had alcohol in his body, arrested him and conveyed him to the Gerrards Cross police station, where he was again asked for a specimen of breath and he again refused. At 12.50 a.m. a police sergeant asked the respondent to provide a specimen of blood or urine for a laboratory test, and warned him that failure to provide that specimen might make him liable to various penalties. The sergeant also told the respondent that a doctor would attend if he chose to supply a specimen of blood. The respondent's answer to that was: "From my toe." A Dr. Keeble was then telephoned and the respondent was told that the doctor would require to take the blood specimen from the respondent's arm. To that the respondent said: "Bring the doctor". At 1.0 a.m. the doctor arrived and he asked the respondent to roll up his sleeve so that a blood specimen could be taken from his arm. The respondent refused to do this, but said he would allow a blood specimen to be taken only from his big toe, and although the doctor, repeated his request the respondent maintained this attitude. The doctor declined to take a specimen from the respondent's big toe, and left the police station. The respondent did not supply a specimen of urine although asked to do so on two occasions, and was warned of the consequences.

The usual method of obtaining a blood specimen is to take the blood from a vein in the person's arm, and that this method is the least painful and gives rise to the least chance of infection, and further that it is not normal medical practice to obtain a blood sample from a person's toe, because it is a method which involves a substantially greater risk of infection than does the normal method.

There is no doubt that there was in this case in the first place the requirement by a police constable to provide a specimen of blood or urine as contemplated by s. 3 (1) of the Road Safety Act 1967. It is equally plain from other provisions of the Act, and indeed as a matter of common sense, that a specimen of blood can only be taken by a medical practitioner. The question which I think presents itself in this case is: what is the proper interpretation of the word "requirement" as it appears in s. 3 (3), which is in these terms:

"A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence..."

The requirement so far as it relates to a specimen of blood must, on any sensible view of the language of this section, as I think, mean a specimen of blood to be abstracted by a doctor. A specimen of blood so taken must be taken by a means and in a way which gives the doctor the right to exercise his instructed professional discretion as to the site on the body from which the blood is to be taken. The words "without reasonable excuse" do not, I think, give rise to any difficulty. If the man had an infection in his arm, a plaster on his arm or something of that sort, that would no doubt be a reasonable excuse for declining to comply with

the requirement that a specimen should be taken from the arm. There was no such reason in this case. In my view that word "requirement" in sub-s. (3) must relate to a requirement by a doctor exercising his medical skill and experience as to the site from which the blood is abstracted. If that is a correct view, it follows that the refusal by the respondent to permit the taking of any blood from his body otherwise than from his big toe was an unreasonable refusal and the justices should have convicted on this charge. I would therefore remit this case to the justices with a direction to convict.

WILLIS, J.: I agree.

LORD PARKER, C.J.: I also agree.

Appeal allowed.

Solicitor: *Sharpe, Pritchard & Co., for J. Malcolm Simons, Kidlington; Willmetts & Co., Slough.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND KARMINSKI, L.JJ., AND GEOFFREY LANE, J.)

April 29, 1969

R. v. CLARKE

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Breath test—Meaning of "requirement" to take test—Refusal to supply specimen—What amounts to refusal—Reasonable excuse—Burden of proof—Road Safety Act 1967 (c. 30), s. 2 (1), s. 3 (3), (6).

Any request to the driver of a motor-vehicle which, it is clear to the driver, is being made as of right is sufficient to amount to a "requirement" to take a breath test under s. 2 (1) of the Road Safety Act, 1967.

Any words or any actions on the part of a driver which make it clear to the jury that in all the circumstances of the particular case he was declining a police officer's proper invitation to provide a specimen for a laboratory test under s. 33, (3) or (6) of the Act amount to a refusal to provide such a specimen.

If a reasonable excuse emerges which excuses the defendant from providing a specimen for a laboratory test, that is a defence to a charge under s. 3 (3). Where evidence of a reasonable excuse has emerged, the burden is on the prosecution to eliminate the defence of reasonable excuse.

APPLICATION by Christopher Henry Tollemache Clarke for leave to appeal against his conviction before the deputy chairman at Inner London Sessions of dangerous driving (count 1) and failing to supply specimens of blood or urine (count 2) contrary to s. 3 (3) (a) of the Road Safety Act 1967, when he was sentenced to six months' imprisonment, concurrent, on each count suspended for two years, and was disqualified for holding a driving licence for six months and 12 months respectively, concurrent. He applied for leave to appeal against sentence on both counts.

D. A. J. Vaughan for the applicant.

The Crown was not represented.

GEOFFREY LANE, J., delivered the judgment of the court: The applicant in this case on 2nd October 1968 at Inner London Quarter Sessions was found guilty of dangerous driving (count 1) and also of failure to provide a specimen of blood or urine contrary to s. 3 (3) (a) of the Road Safety Act 1967. He was sentenced by the deputy chairman to six months' imprisonment on each of

those counts concurrent, those sentences to be suspended for two years, and was disqualified for six and 12 months respectively from driving or holding a driving licence. [After stating the facts, His Lordship continued:] In the early hours of Wednesday 7th February 1968 two police officers in uniform in a police car followed the applicant, who was driving his vehicle along Holland Park Avenue. His driving gave rise to concern; he was weaving from one lane of the road to the other, and the policemen in their car in due course stopped him. His breath smelt of alcohol, and (according to the evidence of the police officers) one of those officers told him that he wished the applicant to take a breath test. The reply was "All right, but I am only tired; I have not been drinking". Then, when the officer went back to the police vehicle in order to get the test equipment, the applicant started up his motor car and suddenly moved off, narrowly missing one of the officers. There then followed a chase over a distance just short of two miles during which, according to the police evidence, the applicant reached speeds of up to 80 miles per hour and went through a number of sets of traffic lights when those lights were showing red. In due course he was stopped by another police car, and was then arrested for failing to take the breath test. He said to the officer "You aren't a police officer". He was then taken to a police station and offered a breath test, but did not take it, just saying that he wanted to see the officer in charge. A little later he was again asked to take a breath test, and on this occasion he said "I want to see my solicitor". He was then asked to supply a specimen of blood then or two specimens of urine within an hour, and was told that he would be given part of any specimen supplied and warned of what would happen if he refused to supply them. To that request he replied "No, I will not do anything until I've seen my solicitor". At a minute before 4.0 a.m. he was asked to supply two samples of urine and warned of the consequence again of refusal or failure, and to that request he replied "No". Then at shortly before 4.15 a.m. he was once again asked for a specimen of blood and warned of the consequences of failure or refusal and told he would be given a part of any sample supplied, and to that request he said "Can I make a statement at this stage?". Immediately thereafter he was charged with failing to take the breath test, failing to supply samples and dangerous driving, and to that charge he made no reply.

A study of the Road Safety Act 1967 makes it clear that there are a large number of hurdles (as they were called at the trial of this case) which the prosecution have to clear before they can bring home a conviction under s. 3 (3). Counsel for the applicant, submits that the prosecution have failed in this respect in the following ways. First of all under s. 2 (1) (almost the first hurdle) the prosecution must prove the following matters, and I read the section:

"A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; ...".

It is said by counsel that there was no evidence of such a requirement or, alternatively, that the deputy chairman failed adequately to direct the jury as to the meaning of the word "require". He submits that the word "require" must in the context of this Act have a different connotation than the word "request", which appears at several places in s. 3 (6). The prosecution evidence on this matter was that P.c. Morris, in uniform (though there was a dispute whether he was or was not in fact in uniform or was wearing his helmet) approached the applicant and said to him "I wish to give you a breath test owing to the manner in which you have been driving this vehicle, as I believe you are

driving with more than the prescribed level of alcohol in your blood". Did that amount to evidence on which the jury was entitled to come to the conclusion that there had been a "requirement"? We take the view that it did. A request in words which it is clear to the defendant is being made as of right is sufficient to amount to a requirement. Accordingly, there is evidence on which the jury would have been entitled to find the point proved.

Secondly, how was it put by the learned deputy chairman to the jury? He put it in this way:

"... the prosecution have to prove so that you are sure that he did fail to give a breath test after he had been required to give a breath test and that the officer Morris had reasonable suspicion for alcohol being in the [applicant's] body."

It is true that earlier in place of the word "required" he had used the word "requested", but that does not, in our view, invalidate the later and accurate direction.

Next counsel submits that unless the Aleotest equipment is ready and available at that very moment for the test to be carried out instant the request or requirement is invalidated. To that proposition we do not accede. The equipment was no doubt in the police vehicle a few yards away, and it would have only required a moment or two to fetch the equipment and to assemble it ready for use. In fact, as already indicated, the applicant drove off before those simple steps could be taken. The next point taken on behalf of the applicant is this. When at 4.13 a.m. he was requested to give a blood sample, that request being made by virtue of s. 3 (6) (c) of the Act, he replied "Can I make a statement at this stage?" It is said that those words do not amount, or cannot amount, to a refusal as is required by the wording of the Act. Plainly no particular formula of words is necessary from a defendant to constitute a refusal by him. It is the police, and not defendants, who are required by this legislation to adhere to formulae. Any words, or indeed any actions, on the part of a defendant, which in the eyes of the jury make it clear that the defendant in all the circumstances of the particular case is declining the policeman's proper invitation, amount to a refusal within the section. The circumstances of the present case were such that the jury were entitled to conclude, and probably did conclude, that the applicant was pursuing a systematic campaign of prevarication, knowing full well that the more time which elapsed before he gave a sample the greater chance of his body metabolising the evidence. That being so, the jury would be justified in inferring from the words "Can I make a statement at this stage?" that this was another refusal, albeit couched in different words.

The deputy chairman's direction on this point was, in the judgment of this court, impeccable. He said this:

"You must also be sure that the [applicant] refused to supply a sample of his blood on that occasion ... It is a matter for you as to whether the [applicant] refused to do so."

He deals accurately with the evidence on the point, and the only possible criticism which can be made of the direction at this stage of the summing-up is that he used the word "fail" on two occasions, plainly referring to the wording of s. 3 (3), which was the section under which the indictment was laid. It might have been happier if he had couched that particular section of his summing-up in different language, but the use of the word "fail" under those circumstances does by no means invalidate the rest of his direction.

The next point taken on behalf of the applicant is this. It is said correctly that the wording of s. 3 (3) makes it clear that if a reasonable excuse emerges

which excuses the applicant from providing a specimen for a laboratory test then that is a defence. It is pointed out (and correctly pointed out) that the deputy chairman in terms placed the burden of proving reasonable excuse on the defendant, the applicant in this matter. In the view of this court, that was an incorrect placing of the burden. It is true, of course, that there must be some evidence of such an excuse before the necessity arises of leaving the matter to the jury at all; however, once such evidence does emerge, it is for the prosecution to eliminate the existence of such a defence to the satisfaction of the jury. In the present case the applicant's excuses were these: first of all, that he was doubtful about what his rights were and wanted legal advice; secondly, that he said he had been manhandled by the police and his work of years had been sullied with foul language from the mouths of the policemen; he wished to have legal advice from the senior officer or a solicitor, and also to make a complaint about the way in which the police had treated him. In the view of this court, such matters could not in those circumstances amount to excuses—let alone reasonable excuses—and the deputy chairman would have been fully justified in declining to leave the matter of excuse to the jury at all. In fact, he did leave it, albeit with the burden of proof wrongly positioned; but the applicant by that action of the deputy chairman fared better than he deserved, and, despite the misdirection, this branch of the application likewise fails.

Finally, it is said that there was an inconsistency in the verdicts of the jury. It is placed in this way. First of all, it is said (correctly) that the jury on finding the applicant guilty on the charge of dangerous driving added a rider, the rider being a request for leniency on the dangerous driving charge for these reasons:

“We feel [said the foreman of the jury] that in the first place he thought he was being chased by thugs. We could not condone that through the three sets of traffic lights.”

It is submitted by counsel that if the applicant in the eyes of the jury was justified in thinking that he was being chased by thugs, it follows that the two policemen who approached him in the first place could not have been wearing uniform and/or could not have said to the applicant what they (the police officers) reported they had said. If that is the case, says counsel, there was no proof that the request for a specimen of breath in the first instance had been made at all and, secondly, the request for a breath specimen had not been made as is required by an officer in uniform. We feel that there is no inconsistency. It was perfectly possible for the applicant to believe he was being attacked or chased by thugs even though those thugs may have been in uniform, and even though they may have used words which were words more usually heard from the lips of policemen. Accordingly, on all those points the application for leave to appeal against conviction is refused.

So far as sentence is concerned, the application being for leave to appeal against sentence on both of the counts, all that one need say is that the penalty imposed was a moderate one in each case, and in the circumstances of this case fully carried out the rider from the jury, to which I have already made reference. I say that because there was evidence that the applicant was short of capital and had very little money, and the result of the alternative possibility (namely, a fine) might very well have been to send him to prison in default of payment. This was a merciful sentence, and in all the circumstances correct. These applications are accordingly refused.

Applications dismissed.

Solicitors: *Anthony Duke & Co.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND KARMINSKI, L.J.J., AND GEOFFREY LANE, J.)

May 1, 1969

R. v. COLEMAN

Criminal Law—Sentence—Suspended sentence—Consecutive sentences totalling over two years' imprisonment—Suspension—Criminal Justice Act 1967 (c. 80), s. 39 (1), s. 104 (2).

Where consecutive sentences the totality of which exceeds two years' imprisonment are imposed, the sentences are by virtue of s. 104 (2) of the Criminal Justice Act, 1967, treated as a single term and there is no power under s. 39 (1) of the Act to suspend the sentence.

REFERENCE by the Home Secretary under s. 17 (1) (a) of the Criminal Appeal Act, 1968 (treated as an appeal against sentence).

On Feb. 12, 1968, the defendant, Barry Coleman, was sentenced to consecutive terms of two years' and two years' imprisonment, suspended for one year, at North East London Quarter Sessions after he had pleaded guilty to two counts in an indictment charging housebreaking and larceny (count 1) and burglary and larceny (count 2), and had asked for 58 other offences to be taken into consideration. On 3rd February 1969, at Northampton Quarter Sessions the appellant was convicted of offences of factorybreaking and larceny, garage-breaking and larceny, simple larceny, and taking and driving away a motor vehicle without the owner's consent, which were committed during the operational period of the suspended sentence. The deputy chairman passed concurrent sentences for the new offences amounting to two years' imprisonment in all. He postponed consideration of the action to be taken in relation to the suspended sentences passed on the appellant at North East London Quarter Sessions because of doubt about the validity of those sentences.

J. Bolland for the appellant.

The Crown did not appear.

WIDGERY, L.J., delivered the judgment of the court: The appellant pleaded guilty at the North East London Quarter Sessions to one count of housebreaking and larceny and to burglary and larceny (count 2). He was sentenced to consecutive terms of two years' and two years' imprisonment in respect of these two counts. The total sentence was thus four years in all, and the court ordered that the sentence should be suspended for one year, 58 other offences being taken into consideration. Since that date, that is to say in February 1969, the appellant has been in trouble again and sentences have been passed on him for similar breaking offences at the Northamptonshire Quarter Sessions. But the matter with which this court is concerned arises solely from the initial sentences passed on 12th February 1968.

The matter comes before the court in a reference from the Home Secretary under s. 17 (1) (a) of the Criminal Appeal Act 1968, and the short question which we are required to determine is whether the sentences passed in February 1968 were according to law. Section 39 (1) of the Criminal Justice Act 1967 provides:

"A court which passes a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than three years from the date of the order, the

offender commits in Great Britain another offence punishable with imprisonment and thereafter a court having power to do so orders under the next following section that the original sentence shall take effect; and in this Part of this Act 'operational period', in relation to a suspended sentence, means the period so specified."

We observe at once that the discretionary power to suspend is limited to a sentence of imprisonment of not more than two years.

Under s. 104 (2) of the Act of 1967, it is provided:

"For the purposes of any reference in this Act, however expressed, to the term of imprisonment or other detention to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term."

The argument therefore is that since the two sentences in the present case were made consecutive, they should be treated under s. 104 (2) as a single sentence of four years' imprisonment. If they are so treated, then it becomes apparent at once that the discretionary power to suspend under s. 39 (1) would not apply.

A somewhat similar matter has been before this court before in *R. v. Flanders* (1). This was a case concerned with s. 39 (3) which provides in these terms:

"A court which passes a sentence of imprisonment for a term of not more than six months in respect of one offence shall make an order under subsection (1) of this section . . ."

The point which arose in *R. v. Flanders* (1) was that the appellant in that case had been sentenced to two periods of six months' imprisonment which were expressed to be consecutive, and the question was whether in those circumstances a mandatory requirement to suspend under s. 39 (3) applied. If by reference to s. 104 (2) it was right in that case to regard the two sentences of six months' imprisonment as being a single sentence of 12 months then of course the mandatory requirement of suspension would not apply. But this court held in *R. v. Flanders* (1) that the mandatory requirement did apply, and that the two sentences albeit consecutive, must be treated as separate sentences for the purposes of sub-s. (3). We have considered whether that decision affects the construction of sub-s. (1), and we think it does not. We are satisfied from the judgment of LORD PARKER, C.J., in *R. v. Flanders* (1) that that case depended on the very special context of the reference to a sentence of imprisonment in respect of one offence under sub-s. (3); indeed LORD PARKER, C.J., said in *R. v. Flanders* (1):

"In the opinion of this court that subsection [that is s. 104 (2)], however, does not affect in any way s. 39 (3); if it did so, it seems quite impossible to conceive the necessity for the exception in para. (c) which provides that there need not be a mandatory suspended sentence if 'on the occasion on which sentence is passed for that offence, the court passes or proposes to pass a sentence of immediate imprisonment on the offender for another offence which the court is not required to suspend'."

In our judgment similar considerations do not apply to the construction of s. 39 (1) where there is no context requiring the court to do other than apply the direction in s. 104 (2). If consecutive sentences are imposed on an occasion and the totality of those sentences exceeds two years, the power to suspend the sentence under s. 39 (1) does not arise. Accordingly, the sentence in this case

was a sentence not authorised by law and must be set aside. The court feels that it can do no other in the situation before it than to direct that the two sentences of two years' imprisonment passed in this case should operate concurrently, not consecutively. It is then open to the court to suspend the sentence, and it will order the same suspension as the learned deputy chairman in the court below sought to order.

Appeal allowed in part.

Solicitors: *Registrar of Criminal Appeals.*

T.R.F.B.

COURT OF APPEAL

(LORD DENNING, M.R., SACHS AND KARMINSKI, L.JJ.)

May 7, 1969

DAVISON *v.* LEGGETT

Road Traffic—Overtaking vehicles—Collision in middle lane—Burden of proof—Inconclusive evidence.

Where a collision occurs between two overtaking vehicles travelling in opposite directions in a centre lane for which both have been competing, the plaintiff is not required to prove that the defendant was negligent. It is sufficient if he establishes a prima facie case that one or other or both of the drivers were negligent. If on the evidence the judge cannot say which of the drivers was to blame, he should find that both are to blame and equally to blame.

APPEAL by the defendant Leggett from a decision of WIDGERY, L.J.

The following statement of facts is taken from the judgment of LORD DENNING, M.R.

On Aug. 1, 1964, there was a collision in Hampton Court Way at about 10.15 p.m. on a clear summer evening. Going in one direction there was Mr. Leggett, who was riding a motor-cycle. Accompanying him was Mr. Mendoza on another motor-cycle. In front of them going in the same direction there was a Hillman Imp driven by Mr. Cooper. Mr. Mendoza overtook the Hillman Imp. Mr. Leggett was following suit. Coming in the opposite direction there was a Mini van driven by Mr. Plumstead, and behind him a Ford Zephyr car driven by Mr. Davison, the plaintiff. The Ford Zephyr was overtaking the Mini van. The two overtakers, Mr. Leggett on his motor-cycle and Mr. Davison in his Ford Zephyr car, collided in the middle of the road. The motor cyclist was seriously injured and the Ford Zephyr car was damaged. There were cross claims one against the other for damages.

At the trial WIDGERY, L.J., relied very much on the two independent witnesses, Mr. Cooper, who was driving the Hillman Imp, and Mr. Plumstead, who was driving the Mini van—though not so much on Mr. Plumstead because he was in error on one or two points. The learned judge found that both Mr. Leggett and Mr. Davison were overtaking and that the collision occurred close to the white line. He then asked himself whether one of them had possession of the middle lane so that the other ought not to have entered it. He could not come to a decision on that point. He said: "In this case I can find no indication whatever as to who began the overtaking operation first." Then he said:

"I find it quite impossible on the evidence before me to say who was in the wrong in providing a situation in which these two vehicles met in this way. It is perfectly feasible that neither was negligent."



At the end the judge said:

"I have come to the conclusion that in this case blame can be attributed to neither, and under the general onus of proof, the plaintiff shall lose his claim and the defendant shall lose his counterclaim."

The defendant Leggett appealed.

J. G. Paulusz for the defendant.

W. E. Barnett for the plaintiff.

LORD DENNING, M.R. [after stating the aforementioned facts]: Unfortunately the trial judge was not referred to the many cases on this subject. The reason was, no doubt, because counsel in the case had not anticipated the facts as found by the judge. There are a number of decisions in this court dealing with a collision where both parties are overtaking. *Prima facie* one or other or both are to blame. If the judge cannot say which it was, he should find that they are both to blame and equally to blame. The authorities start with *Baker v. Market Harborough Industrial Co-operative Society, Ltd.* (1), and go on to *France v. Parkinson* (2), and *Shiner v. Webster* (3) on April 26, 1955. Counsel before us sought to revive an old fallacy. He said that the plaintiff must prove that the defendant was negligent. But that is not so in a case of this kind. It is sufficient if he shows that *prima facie* one or other or both drivers were negligent. I would allow the appeal and hold that both were equally to blame and damages to be assessed accordingly.

SACHS, L.J.: I agree. This case concerns an accident that manifestly ought never to have occurred. Two streams of traffic were going in opposite directions along a clearly lit 30 ft. straight road. In essence, a moment came when two of the vehicles were competing for what in effect was the centre lane where there simply was not enough room for both to be at the same time. (It is to be observed that counsel, who has most persuasively argued the case for the respondent, accepts that these two vehicles were in the centre lane at the same time.) It is to be observed that they were approaching each other at a combined speed that must, as **KARMINSKI, L.J.**, has pointed out, have been of the order of 100 miles an hour. Obviously it was rash for any vehicle in that situation to come out into the centre part of the road unless he was sure that he had some safeguard against the position that would arise if some one else tried to do the same thing at the same time.

It is as well to remember that, leaving out special situations, such as inevitable accident, the intervention of some unexpected event such as a manhole blowing up, a flash of lightning, or something occurring due to a third party's action, the correct view is that stated by **DENNING, L.J.**, in *Baker v. Market Harborough Industrial Co-operative Society, Ltd.* (1) as follows:

"Every day, proof of the collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitatingly hold that both were to blame. They would not escape simply because the Court had nothing by which to draw any distinction between them."

That, if I may respectfully say so, is a salutary rule without which the law would be in a sad condition in relation to passengers in cars as well as drivers.

(1) [1953] 1 W.L.R. 1472; 97 Sol. Jo. 861.

(2) [1954] 1 All E.R. 739.

(3) (1955), *unrep.*

That rule does not differ if witnesses give inconclusive evidence. Prima facie when there is a case of negligence against two defendants, it remains good until displaced. Of course, the first task of a judge is to seek to determine the facts so as to assess as between two defendants where blame lies. Should he be unable to do so, the prima facie case prevails. Accordingly, this appeal should be allowed.

KARMINSKI, L.J.: I also agree that this appeal should be allowed.

LORD DENNING, M.R.: We will allow the appeal and say that judgment is to be entered on claim and counterclaim for damages to be assessed by a master, if not agreed. The appellant is to have the costs in this court, and, if need be, the legal aid taxation. No order as to costs in the court below.

Appeal allowed.

Solicitors: Rowley, Ashworth & Co.; John Hunt, Croydon.

T.R.F.B.

CROWN COURT, LIVERPOOL

(FISHER, J.)

February 13, 1969

R. v. HART, MILLAR AND OTHERS

Criminal Law—Jurisdiction—Aiding and abetting—Principal offence committed in England—Persons accused of aiding and abetting situated in Scotland.

An articulated lorry was driven on a highway in England by H., on the instructions of his employers M. and R. M., Ltd., it being then in a defective mechanical condition with the result that it became out of control, collided with another vehicle, and caused the deaths of six persons. R.M., Ltd., was a Scottish company and its place of business was in Scotland, and M. was in Scotland at all material times. R.M., Ltd., and M., being charged with aiding, abetting, counselling, and procuring H. to cause the deaths by dangerous driving contrary to s. 1 of the Road Traffic Act, 1960, moved to quash the indictment for want of jurisdiction.

HELD: if the offence charged was committed it was committed when the principal offence was complete, i.e., when the deaths were caused by the dangerous driving of H., and at the place where that dangerous driving took place, namely, in England, and, therefore, an English court had jurisdiction to try the indictment.

MOTION before arraignment by Robert Millar and Robert Millar (Contractors), Ltd., to quash an indictment in which they were charged with aiding, abetting, counselling, and procuring one Anthony Hart to cause death by driving in a manner dangerous to the public.

A. S. Booth for the Crown.

G. H. Wright for Millar and Robert Millar (Contractors), Ltd.

J. R. Arthur for Hart.

Cur. adv. vult.

FISHER, J., read the following judgment: The charges against the accused Anthony Hart, Robert Millar, and Robert Millar (Contractors), Ltd., in this indictment are that the accused Hart caused the death of six people by driving in a manner dangerous to the public and that the accused Millar and Robert Millar (Contractors), Ltd., aided and abetted, counselled and procured those offences. Counsel for the accused Millar and Robert Millar (Contractors), Ltd., has put in a plea to the jurisdiction of the court, and he has quite correctly done so at this stage of the trial before the accused have been arraigned. The plea reads as follows in the case of the accused Millar (Contractors), Ltd.:

"Robert Millar (Contractors), Ltd. say that the court ought not to take cognisance of the indictment against them because . . . the court has no jurisdiction to try the [accused] on charges of being an aider and abettor when the acts of aiding and abetting, counselling and procuring alleged in the indictment if committed were committed outside the jurisdiction of the court namely in Scotland where the registered office and place of business [of the accused] is situated."

The plea in the case of the accused Millar reads:

"... the court ought not to take cognisance of the indictment against me because . . . there is no evidence in the depositions of any act or omission by me committed within the jurisdiction and therefore the court has no jurisdiction to try me on the charges laid in the indictment."

In order to make the plea intelligible, I should state shortly what is alleged against the accused. Before I do that, I should say that Alfred George Keats, the clerk of the court, has joined issue on behalf of the Queen with that plea. The charge arises out of a terrible accident on the M.6 motorway, when an articulated lorry crossed the central reservation to the other carriageway and struck a vehicle and killed six people. What is alleged is that the cause of the accident, while it may or may not have included any particular manner of driving by the driver, was the state of one of the front tyres of the lorry which was in a bad condition and which burst, causing the vehicle to career out of control across the motorway as I have described. It is also said that the accident was aggravated, if not caused, by the improper state of the brakes of the trailer, and it is said that the driver knew of the state of the front tyre and knew or ought to have known of the state of the brakes.

It might be thought that the words of s. 1 of the Road Traffic Act 1960 which make driving in a manner dangerous to the public an offence were directed against the manner in which the person driving the vehicle handled the vehicle on the road and that it was not an offence under this section to drive a vehicle which was by reason of its mechanical condition likely to break down or become out of control and so give rise to danger, but it has been held by the Court of Criminal Appeal in *R. v. Spurge* (1) that it is an offence under the section dealing with driving in a manner dangerous to the public to drive a vehicle on a road if it is in a mechanical condition such that it may become out of control and thereby give rise to injury to members of the public. It was held that, if the driver neither knew nor ought to have known of the existence of the mechanical defect, then he can put this forward as a ground of defence, but that he cannot do so if he knew or ought to have known of the existence of the defect. It seems, therefore, on the law as laid down by the Court of Criminal Appeal in that case that, if it is established that a vehicle, although being driven properly, became out of control and caused danger by reason of some mechanical defect of which the driver knew or ought to have known, that he is guilty of an offence under the section.

What is alleged against the accused Millar and Robert Millar (Contractors), Ltd., is this. The accused Robert Millar (Contractors), Ltd., are the company which own the lorry and the accused Millar—I do not know his exact position in the company—is in a responsible position in the company, and it is said that, by reason of the knowledge which he had or which is to be imputed to him, and the knowledge which through him the company had or which is to be imputed to the company, the accused Millar and Robert Millar (Contractors), Ltd., counselled

(1) 125 J.P. 502; [1961] 2 All E.R. 688; [1961] 2 Q.B. 205.

and procured the driver to commit the offence of causing death by dangerous driving or the lesser offence which is open on the indictment of dangerous driving. Of course the facts may well be in dispute, but for the purpose of this plea it is necessary to take the facts as alleged and it is said that, by requiring or permitting the accused Hart to take the vehicle out on the road in the state in which to their knowledge (actual or imputed) it was, they counselled and procured him to commit an offence of dangerous driving or causing death by dangerous driving.

The bursting of the tyre and the resultant accident took place in England. The accused Robert Millar (Contractors), Ltd., are a Scottish company and their place of business is in Scotland. The accused Millar was at all material times in Scotland, and the circumstances from which an actual or imputed knowledge of the state of the vehicle is to be inferred are all matters occurring in Scotland; and it was at that place, if anywhere, that the accused Millar and Robert Millar (Contractors), Ltd. required or permitted the accused Hart to take the vehicle on the road. But it appears from the depositions—at least, I infer from the depositions—that their instructions to him were to drive the vehicle to a destination in England, and it was in the course of travelling to that destination or returning from it that the accident occurred.

It is common ground, as I have said, that, in the absence of a statutory provision to the contrary, no person can be tried under English law for an offence committed outside the English jurisdiction, and for this purpose Scotland is a country outside the jurisdiction of the English courts. The question which I have to determine is whether the offence with which the accused Millar and Robert Millar (Contractors), Ltd. are charged, assuming the allegations in the depositions to be true, was committed outside England or in England. I find in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.) at para. 67, p. 26, the following statement.

"... a person who from a foreign country initiates acts which take effect in England and are criminal by the law of England appears to be liable to indictment and punishment in the county or place in England in which the acts take effect."

There are three cases cited in support of that proposition, but two of them (*R. v. De Marny* (1) and *R. v. Stoddart* (2)) appear to me to have little relevance. The remaining case is *R. v. Oliphant* (3). In that case:

"The defendant was employed by a firm, carrying on business in London, to manage their branch establishment in Paris. It was his daily duty to enter on slips an account of all sums received by him in Paris for his employers, and to transmit these slips to them in London in order that the amounts might be entered up in a cash-book kept in London. On a certain date the defendant received three sums in Paris which he fraudulently appropriated to his own use, and omitted to enter the receipt thereof on the slips sent by him on that day to London, knowing and intending that the same would in consequence be omitted from the cash-book, as was the case. The defendant was indicted at the Central Criminal Court under s. 1 of the Falsification of Accounts Act, 1875, for omitting, or concurring in omitting, material particulars from the cash-book, and convicted..."

It was held by the Court of Crown Cases Reserved "that the court had jurisdiction to try the case, and that the defendant was rightly convicted". LORD ALVERSTONE, C.J., said that, in his opinion, the case came within the principle

(1) 71 J.P. 14; [1904-07] All E.R. Rep. 923; [1907] 1 K.B. 388.

(2) (1909), 73 J.P. 348.

(3) 69 J.P. 230; [1905] 2 K.B. 67.

of *R. v. Munton* (1), a case in which the accused had been the principal store-keeper in Antigua. LORD ALVERSTONE, C.J., continued:

"He purchased certain stores in England at a nominal price agreed upon between him and the seller, which price he charged to the government in his returns to the Navy Office, and by collusion with the seller the latter made to him an allowance, by which the government were defrauded to a large amount. It was contended for the defendant that the offence had been wholly completed in the West Indies, and that therefore the court had no jurisdiction to try the defendant; but LORD KENYON disposed of this objection by pointing out that 'it appeared that the several false charges made by the defendant by which he had defrauded the government had been in the several returns by him from Antigua to the Navy Office in London. There was thereby an offence committed in London where such false returns were received, and where the fraud had been complete by their having been there allowed, upon which the jurisdiction of the court attached'."

The other judges concurred. RIDLEY, J., said:

"The only authority to which I need refer is the case of *R. v. Munton* (1) which is, I think, clear authority for saying that the receipt of the slips in London makes the offence complete in London..."

In that case, as in *R. v. Munton*, it seems that the person in England who would be the actor in England was an innocent party. Counsel for the accused Millar and Robert Millar (Contractors), Ltd. has submitted that, if the actor in England had been an accomplice of the person abroad, that would have made a difference to the decision; but, simply taking that case and *R. v. Munton* by themselves, it does not appear to me that that is so. It may indeed be that in a fraud case there would be no fraud unless the person in England were innocent. But so far as the jurisdiction question is concerned, it would not appear to me to have affected the decision if there had been a guilty actor in England collaborating with the defendant abroad.

In ARCHBOLD there is a further sentence in the same paragraph which states:

"Nor is a foreigner liable for any act done on land outside England, although the consequence of the act may subsequently take place in England, e.g., where a foreigner strikes a person on land abroad who subsequently comes to England and dies of the blow."

There are three cases cited to support that: *R. v. Lewis* (2), *R. v. Depardo* (3) and *R. v. De Mattos* (4). It does not seem to me that those cases assist since, although the consequence may be death here in England, the criminal act was completed abroad, namely, the striking of the blow.

In 10 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 316, para. 577, there is stated the general proposition that English courts exercise criminal jurisdiction in respect of acts done in England or on British ships on the high seas or in territorial waters, and then on p. 318, para. 581 states:

"For the purposes of criminal jurisdiction, an act may be regarded as done within English territory, although the person who did the act may be outside the territory; for instance, a person who, being abroad, procures an innocent agent or uses the post office to commit a crime in England

(1) (1793), 1 Esp. 62.

(2) (1857), 21 J.P. 358.

(3) (1807), 1 Taunt. 26.

(4) (1836), 7 C. & P. 458.

is deemed to commit an act in England. If a person, being outside England, initiates an offence, part of the essential elements of which take effect in England, he is amenable to English jurisdiction . . ."

The cases cited in support of that proposition include *R. v. Munton* (1) and *R. v. Oliphant* (2).

Paragraph 581 in *HALSBURY* continues:

"It appears that even though the person who has initiated such an offence is a foreigner, he can be tried if he subsequently comes to England. Where, however, an intelligent acting agent has been interposed between the initiation of the crime abroad by a foreigner and its commission in England, difficulties may arise as to the jurisdiction of the English courts over the foreigner. If a person, being outside English territory, were intentionally to fire at and kill a person in English territory in such a manner that the act amounts to murder, the person who fired could be tried for murder in England. A person who makes a false representation outside England, and by means of the representation obtains goods in England, may be tried in England for the crime of obtaining goods by false pretences."

In note (r) on p. 318 there is cited *R. v. Rogers* (3). The headnote in that case reads:

"A clerk whose duty it was to remit at once to his employers in Middlesex all moneys collected by him as their clerk, collected at York . . . a sum of money as such clerk, but never remitted any portion of it."

He wrote letters from Yorkshire to his employers in Middlesex "making no mention of the money so collected", and also a letter—

"which was intended to make them believe that he had not then in fact collected the money in question. These letters were duly received by the employers in Middlesex,"

and it was held by *KELLY, C.B., and FIELD, LINDLEY and MANISTY, JJ., HUDDLESTON, B.*, dissenting—

"that the receipt of the letter of the 21st of April in Middlesex was sufficient to give jurisdiction to try the prisoner in Middlesex."

FIELD, J., said:

"Now it may be, under these circumstances, that he might have been well tried in Yorkshire, but that is not the question before us. The question before us is whether there was jurisdiction to try him in Middlesex; in other words, was a material part of the crime committed in Middlesex? Upon this it is to be observed, that the law presumes innocence until guilt is proved. If a complete embezzlement had been proved in Yorkshire, no part of which was committed in Middlesex, a different question would have arisen, but here there is no proof or indication of a complete embezzlement prior to the letter of the 21st of April, in which he gives a false account, showing that he had at that time committed the embezzlement. The evidence of embezzlement in Yorkshire would have been the writing and posting there of the letters, and the letter of the 21st April (for it is not necessary to consider the effect of the others) which contained the first evidence of the embezzlement was not only written and posted in Yorkshire, but was addressed to the prisoner's employers in Middlesex, and there

(1) (1793), 1 Esp. 62.

(2) 69 J.P. 230; [1905] 2 K.B. 67.

(3) 42 J.P. 37; 3 Q.B.D. 28.

received by them, and opened and read, which was intended by the prisoner. Now, there is a strong authority to be found as to the effect to be given to the sending of the letter to Middlesex. In the case of *Evans v. Nicholson* (1), the court regarded a letter as speaking continuously from the moment of its being posted until its receipt by the addressee for the purpose of giving jurisdiction, and the reasoning is in this way: A letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of the firing of a shot, or the throwing of a spear. If a shot is fired, or a spear thrown, from a place outside the boundary of a county into another county with intent to injure a person in that county, the offence is committed in the county within which the blow is given. So with a letter. There may in this case have been evidence on which a Yorkshire jury might have convicted the prisoner, but I think there was also clearly evidence which justified his conviction by a Middlesex jury."

There appears in the speech of LORD HALSBURY, L.C., in *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler* (2) an expression of opinion criticising to some extent the kind of reasoning followed by FIELD, J., in that case. The *Badische Anilin* case was not a criminal case, and the facts were far away from those of any criminal matter:

"A trader in England ordered goods from a foreign manufacturer in Switzerland to be sent by post to England. The manufacturer addressed the goods to the trader in England and delivered them to the Swiss Post Office, by whom they were forwarded to England. The goods were manufactured according to an invention protected by an English patent:—Held that since the contract of sale was completed by delivery to the Post Office in Switzerland and since the Post Office was the agent of the buyer and not of the vendor, the vendor had not made, used, exercised or vended the invention within the ambit of the patent, and that the patentee had no right of action against the vendor for an infringement of the patent."

LORD HALSBURY, L.C., said:

"My Lords, I am myself, I confess, not impressed by the reference either to *Coombes' Case* (3) or to the hypothetical cases put of the shoot, or the throwing of patented articles over the border between two places close to each other. With reference to *Coombes' Case*, I think one may say that there is a confusion of thought between the technical rules of criminal venue, and the question, who is the person doing the act? But, apart from such a comment as that, there is this obvious distinction between all those three cases and this, that the act is completed by the person who is assumed to be the author of the act in each of the cases so propounded; but here there is this difference, that an intelligent acting agent is interposed between the buyer and the seller, namely the agent who carries away from Switzerland to England. In order to make the analogy complete, you must have some person or another in *Coombes' Case* to help the bullet on to its destination; or, in the other case, to suck it down, as A. L. SMITH L.J. puts it, or to put it on some place where the natural course of gravitation would bring it down apart from any other act or by any one else. My Lords, I think these are rather fanciful suggestions, because the real substantial

(1) (1875), 32 L.T. 778.

(2) [1898] A.C. 200.

(3) (1785), 1 Leach. 388.

question here is, what jurisdiction have we over an act which is done in Switzerland by a Swiss subject, and which, in all that is done, is (it cannot be doubted) an act within the jurisdiction of the Swiss Courts, if there were any patent law applicable to it, but is not within our jurisdiction at all?"

I regard those observations as in the truest sense obiter, since LORD HALSBURY, L.C., did not have a criminal case before him. Counsel for the accused Millar and Robert Millar (Contractors), Ltd. relies on them, since he says that, in the present case, there was an intelligent acting agent (namely, the driver) interposed between his two clients and the occurrence of the accident, and he seeks to distinguish on that ground *R. v. Oliphant* (1) and *R. v. Munton* (2), which I have already cited; and he relies on the reference by LORD HALSBURY, L.C., to the interposition of an intelligent acting agent. For my part, however, I cannot see that the fact that there is a collaborating agent makes any difference in the circumstances which I have to consider. Those under consideration by LORD HALSBURY, L.C., were very different and, as I have said, his observations were obiter and I do not feel obliged to regard them as displacing the authorities to which I have referred which were dealing with criminal matters.

DICEY AND MORRIS ON THE CONFLICT OF LAWS (8th Edn.) do not devote any part of their book to the question of the locus delicti in criminal matters, but there is a substantial passage at pp. 947-951 devoted to the question of tort. This is a question which has exercised courts in the United States of America a great deal, as is not surprising when one remembers that there are fifty separate jurisdictions in the United States, and differing views are held. DICEY states with considerable pertinence as follows on p. 948:

"... if X, resident in England, negligently fails to renew the tyres of his car or to keep the brakes in proper order, and thereby while driving the car in Scotland causes an accident in which A is injured, there is no obvious answer to the question where the tort was committed."

A pertinent observation, but not helpful to me in the task which lies in front of me. If one reverses Scotland and England in that example, and if one supposes that it is X who negligently fails to renew the tyres and keep the brakes in proper order and another person Y, who is driving the car at the time of the accident, there is obviously a close parallel to the facts of the present case, but the editors of DICEY do not hazard an answer. However, they go on to state on p. 948:

"The prevailing view in the United States is that the locus delicti is the country where the last event necessary to make an actor liable for an alleged tort takes place. According to this if X, through his negligence in maintaining his car in State A, causes an injury to Y in state B, as the result of which Y dies in State C, the tort is committed in State B."

That is to say, the State in which the injury is inflicted. They go on to say that this view has not been followed in all American cases and has been criticised by writers, and they then mention that DR. CHESHIRE in his work on PRIVATE INTERNATIONAL LAW (7th Edn.) takes the view that the locus delicti commissi is in any country where the wrongdoer acted or, in case of a tort by omission, ought to have acted and in any country in which the effect of such wrong took place.

In civil cases in England, the question has arisen most frequently on applications under R.S.C., Ord. 11, r. 1, for leave to serve writs or notice of writs outside

(1) 69 J.P. 230; [1905] 2 K.B. 67.

(2) (1793), 1 Esp. 62.

the jurisdiction, one of the grounds being that the action is in respect of a tort committed within the jurisdiction. The leading case on that is *George Monro, Ltd. v. American Cyanamid and Chemical Corpn.* (1), a decision of the Court of Appeal refusing to grant leave to an English company to serve notice of a writ on an American corporation in an action for negligence on the ground that the plaintiffs had incurred loss in England through the defective condition of goods supplied in New York by the defendants under a contract of sale governed by the law of New York where property had passed to the plaintiffs. The court held that, even though the occurrence of damage was within the jurisdiction, it was not correct to say that the tort was committed where the damage was suffered.

Counsel for the accused Millar and Robert Millar (Contractors), Ltd. has referred me to *Cordova Land Co., Ltd. v. Victor Brothers, Inc.* (2), a decision of WINN, J., which concerned, inter alia, a company resident in the United States of America which had neither assets nor an agency in England. This company sold a quantity of skins c.i.f. to Hull which wereshipped in two vessels from Boston to Hull and the masters of the vessels issued clean bills of lading. On arrival, the skins were found to be badly damaged. The buyers sought leave to give notice of a writ in America against the shipowners for alleged fraudulent misrepresentation of their masters in issuing clean bills of lading and WINN, J., dealing with that part of the case, referred to some observations of LORD TUCKER's in *Briess v. Woolley* (3), where he had said:

"The tort of fraudulent misrepresentation is not complete when the misrepresentation is made. It becomes complete when the misrepresentation—not having been corrected in the meantime—is acted on by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted on by the representee the tortious act is complete, provided that the representation is false at that date."

WINN, J., said that that dictum establishes that the tort is first complete when the representation is relied on, although it will not become actionable until damage has resulted. He said that what one has to look at is the substance of the wrong conduct alleged to be a tort and that, if the reality of the matter be that the wrongful act which was being committed outside the jurisdiction merely produced results within the jurisdiction, then it is wrong for the court to give leave to serve out of the jurisdiction. It is to be observed on the operation of R.S.C., Ord. 11, r. 1, as SCOTT, L.J., said in the *American Cyanamid* case (1) in the passage which WINN, J., quoted:

"Service out of jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected. . . . As a matter of international comity it seems to me important to make sure that no such service shall be allowed unless it is clearly within both the letter and the spirit of R.S.C., Ord. XI."

WINN, J., proceeded to hold that the substance of the wrongdoing occurred in the United States of America.

I cannot pretend that the state of the authorities leaves me in an easy position. I look at the case in this way: It does not appear to me to be necessary to decide whether the offence of driving dangerously is committed continuously by the

(1) [1944] 1 All E.R. 386; [1944] K.B. 432.

(2) [1966] 1 W.L.R. 793.

(3) [1954] 1 All E.R. 909; [1954] A.C. 333.

driver from the moment that he drives off with a lorry which he knows or ought to have known was in a mechanical state which might cause an accident or whether the offence is only committed when the accident happens, since it does not appear to me that the distinction between those two possible views alters the position of persons alleged to be aiders and abettors. The offence of causing death by dangerous driving is plainly not committed until the death occurs, and in the present case the death occurred in England. Where an employer with actual or imputed knowledge of the defective mechanical state of the vehicle permits an employee to take that vehicle out on the road he is, so this indictment alleges, counselling and procuring the employee to drive that vehicle in that state, and it seems to me that the common sense of the matter is that that counselling and procuring is a continuous act which persists so long as the driver is driving the vehicle in that condition on the road.

If the true view is that the driver is liable to be charged with dangerous driving at any moment during his journey, as it would appear to be, for example from *R. v. Spurge* (1), then, in my judgment, if the allegations in this indictment are correct, the employer could be charged at that moment with counselling and procuring, and if that is right, then if at any particular moment the dangerous driving by the driver causes someone's death, then it would seem to me that the counselling and procuring (subject to questions which may arise as to foreseeability) would amount to a counselling and procuring of the causing of the death by dangerous driving. If the view I have expressed is right, the employer had up to that moment and at that moment counselled and procured the dangerous driving which on this assumption caused death. The offence of the driver is not complete until he either drives dangerously on the road in the case of the lesser charge or causes death by dangerous driving in the case of the more serious charge, and it seems to me that a person cannot be guilty of aiding and abetting, counselling and procuring, unless and until the principal offence is committed.

If one imagines one person A standing on one side of the border counselling and procuring another, B, to burgle a house across the border and B sets off across the border to burgle a house, if he changes his mind and returns without having burgled it, then A can be guilty of no offence. But if B, having reached the house, persists and does that which he has been counselled and procured to do, then and only then does A become liable to be convicted for aiding and abetting, counselling and procuring. It seems to me that, if it were right, as counsel for the accused Millar and Robert Millar (Contractors), Ltd. has submitted, that the counselling and procuring ceased at the moment when the lorry drives off on to the road, it is impossible that anybody could ever be charged with counselling and procuring the driving of a vehicle on a road, and the person who counselled the burglary in my example could never be charged with counselling and procuring the burglary even though on the facts that is obviously what he had done.

If I apply FIELD, J.'s test in *R. v. Rogers* (2), it seems to me that the offence of counselling and procuring the causing the death by dangerous driving, if it was committed, was committed at the time when the offence was complete, that is to say, at the time when the death was caused by the dangerous driving of the driver, if it was so caused, and at the place where that took place, namely, in England. If I apply WINN, J.'s test in the *Cordova Land* case (3), it seems

(1) 125 J.P. 502; [1961] 2 All E.R. 688; [1961] 2 Q.B. 205.

(2) 42 J.P. 37; 3 Q.B.D. 28.

(3) [1966] 1 W.L.R. 793.

to me that the substance of the wrongful conduct alleged against the accused Millar and Robert Millar (Contractors), Ltd. does persist throughout the time that the lorry is on the road by their direction in a defective mechanical state, of which knowledge is to be imputed to them, and, if the allegations in the indictment are correct, as I must assume for present purposes they are, that was the situation.

Counsel for the accused Millar and Robert Millar (Contractors), Ltd. advanced one further point in support of his argument and that is that there was, until the passing of the Criminal Law Act 1967, a statutory provision in force expressly providing that, where a felony was committed in England, any accessory before the fact could be tried in any place where the principal felony could be tried. That was in s. 7 of the Accessories and Abettors Act 1861, which is set out at para. 4150 of ARCHBOLD. But that section has been repealed by the Criminal Law Act 1967 and, since the distinction between felonies and misdemeanours has been abolished, all offences are now to be dealt with in the same way as misdemeanours were formerly dealt with and the law in regard to aiders and abettors of misdemeanours is that whoever aids and abets, counsels and procures the commission of a misdemeanour is liable to be tried as a principal offender. In this indictment, although it is in form alleging aiding and abetting, counselling and procuring against the accused Millar and Robert Millar (Contractors), Ltd., they are charged as principal offenders. Counsel submits that the presence of that section in the Act of 1861 shows that, if it had not been present, it would not have been the law that accessories could be tried in any place where the principal felony could be tried. It seems to me that it would be wrong for me to draw that inference from the presence of that section in relation to accessories before the fact when I am dealing not with an accessory before the fact charged as such, but with an aider and abettor charged as a principal offender, and where, in my judgment, the whole tenor of the authorities which I have quoted points to the conclusion that the aider and abettor can be tried in England if the offence with which he is charged becomes complete within the jurisdiction, as I have indicated in my judgment is so in the present case.

For the reasons which I have endeavoured to give, I give judgment for the Crown on this plea to the jurisdiction.

Motion refused.

Solicitors: *Director of Public Prosecutions; Mace & Jones, Liverpool; Colin R. Watson & Co., Warrington.*

G.F.L.B.

COURT OF APPEAL (CIVIL DIVISION)

(LORD DENNING, M.R., SACHS AND PHILLIMORE, L.JJ.)

April 30, May 1, 1969

JELSON, LTD. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT
AND OTHERS

GEORGE WIMPEY & CO., LTD. v. MINISTER OF HOUSING AND LOCAL
GOVERNMENT

Compulsory Purchase—Compensation—Assessment—Appropriate alternative development—Certificate—Opinion as to expected planning permission—Relevant dates—Land Compensation Act, 1961, s. 17 (4).

Where, for purposes of assessing compensation, application is made for a certificate of appropriate alternative development, a local planning authority must, under s. 17 (4) of the Land Compensation Act, 1961, form an opinion as to what planning permission might have reasonably been expected to be granted as at the date of (a) the actual notice to treat, (b) the deemed notice to treat, or (c) the offer to purchase, as the case may be.

APPEALS by Jelson, Ltd., and George Wimpey & Co., Ltd. from decisions of BROWNE, J., dismissing their applications to vary nil certificates given by the Minister of Housing and Local Government under s. 17 of the Land Compensation Act 1961.

M. H. Spence for Jelson, Ltd.

Lymbery, Q.C., and *Jowitt, Q.C.*, for George Wimpey & Co., Ltd.

Blennerhassett, Q.C., and *Dobry, Q.C.*, for the Minister of Housing and Local Government.

LORD DENNING, M.R.: Leicester is expanding. It has reached Blaby in the outskirts. Before the war there was a proposal that there should be a ring road round Leicester. In 1951 the county development plan showed a proposed ring road and showed the land on either side of the proposed ring road as being allocated primarily for residential purposes. In 1954 the applicants George Wimpey & Co., Ltd., bought a good deal of the land there, which included part of the site of the proposed ring road. A family called Jelson owned much of the land, which also included part of the proposed ring road. In 1954 Jelsons themselves became a limited company, Jelson, Ltd., soon afterwards Wimpseys and Jelsons ("the applicants") applied for planning permission for residential development of the land they owned. They were granted permission to build housing estates on the land allocated for residential purposes; but they were refused permission to develop the site of the proposed ring road. In pursuance of that permission, both applicants built great housing estates adjoining the proposed ring road. There remained a long narrow strip of land, about 146 feet wide, awaiting the proposed ring road.

But in 1962 the proposal for the ring road was abandoned. The reason was because a big motorway, the M.1, was built in the neighbourhood. In consequence, there was no need for the ring road. Thereupon both applicants applied for permission to develop the site of the proposed ring road for residential purposes. It was a long narrow strip, of which the applicants Wimpseys had some 2½ acres and the applicants Jelsons 5½ acres. On 31st December 1964 the Minister refused both of them permission to develop this long narrow strip. He stated that:

"He considered that the long, narrow shape of the two other sites did not lend itself to a normal residential lay out and would, if permitted, result in

an arrangement of gardens and garages which would spoil the outlook from the fronts of a large number of existing houses to an unacceptable degree."

In short, permission was refused because of the housing estates. If houses were allowed on this long narrow strip, it would spoil the existing houses which both applicants had built. Seeing the strip thus rendered sterile, both applicants sought to compel the local authority to buy the land. They served a notice under s. 129 of the Town and Country Planning Act 1962, requiring, the respondents, the Blaby Rural District Council to purchase the strip on the ground that permission had been refused and that the land had become incapable of reasonable beneficial use in its existing state. There was an inquiry by an Inspector who recommended that the purchase notice should be confirmed. On 28th September 1965 the Minister accepted the inspector's recommendation.

"The Minister is satisfied [said the decision] that the conditions specified in paragraphs (a) and (c) of sub-s. (1) of s. 129 of the Act are fulfilled and is of the opinion that in this case confirmation is the only appropriate action. He accordingly confirms the purchase notice and directs that the [respondent council] shall be deemed to have served today a notice to treat in respect of the interest held by [applicants Jelsons] in the land in question."

The effect of that decision is prescribed by s. 133 (1) of the Act. Its effect was that on 29th September 1965, the respondent council was deemed to have served notice to treat in respect of this strip of land so as to acquire it compulsorily.

The question now is: What compensation is to be paid for the deemed compulsory acquisition? For this purpose we have to turn to the Land Compensation Act 1961. We then find that the amount of compensation depends on whether (if there had been no deemed compulsory acquisition) both applicants might reasonably have expected to get permission to build residential houses on this strip. If they might reasonably have expected permission for residential development, the local authority should issue to them a valuable certificate within s. 17 (4) (a) of the Act of 1961 on which they would get large compensation. But, if they could not reasonably have expected permission for residential development, the local authority would only issue to them a nil certificate within s. 17 (4) (b) of the Act of 1961, on which they would get little compensation.

Both applicants applied for a valuable certificate. The respondent council refused and issued a nil certificate. Both applicants appealed to the Minister under s. 18. On 23rd June 1967 the Minister confirmed the nil certificate. His letter of decision stated:

"The Minister agrees that it is a fair assumption that had it not been for the Outer Ring Road proposal the land in question would have been included as part of the housing estates which flank it. However, in view of its shape and the disposition of adjoining houses, the Minister is satisfied that planning permission could not reasonably have been expected to be granted for residential development of the land, if it had not been acquired by an authority possessing compulsory purchase power . . . The Minister having considered all forms of development for which permission might reasonably have been granted has decided to issue a 'nil' certificate."

Both applicants were aggrieved by the Minister's decision and applied to quash it under s. 21 of the Land Compensation Act 1961. BROWNE, J. upheld the decision of the Minister. Both applicants now appeal to this court.

After the discussion we have had, I think the decision depends on this one short point under s. 17 (4); what is the date at which it must be decided whether

planning permission "might reasonably have been expected to be granted". The Minister says it must be decided as at the date of the deemed notice to treat, that is, on 29th September 1965. At that date there was this long narrow strip of land bordered by great housing estates on either side. At that date planning permission would not be granted for any beneficial purpose. So there should be a nil certificate. But both applicants say that that is not that date at all. They say that the date should be some time in the distant past before there was any proposal for a ring road. At that time they might reasonably have expected planning permission to be granted, not only for the housing estates, but also for this long narrow strip for residential development.

Whichever date is taken, there are anomalies. Each side has drawn our attention to them. So much so that I think we must go simply by the construction of the Act of 1961. I will miss out the preliminaries and come straight to s. 17 (4). It provides:

"Where an application is made to the local planning authority for a certificate under this section in respect of an interest in land, the local planning authority shall . . . issue to the applicant a certificate stating either of the following to be the opinion of the local planning authority regarding the planning permission that might have been expected to be granted in respect of the land in question, if it were not proposed to be acquired by any authority possessing compulsory purchase powers, that is to say—(a) that planning permission for development of one or more classes specified in the certificate (whether specified in the application or not) might reasonably have been expected to be granted; or (b) that planning permission could not reasonably have been expected to be granted for any development other than the development (if any) which is proposed to be carried out by the authority by whom the interest is *proposed* to be acquired."

The crucial word in that subsection is the word "proposed", which is defined in s. 22 (2):

"For the purposes of sections seventeen and eighteen of this Act, an interest in land shall be taken to be an interest *proposed* to be acquired by an authority possessing compulsory purchase powers in the following (but no other) circumstances, that is to say—(a) [(put shortly) where there is an *actual* notice to treat; (b) (put shortly) where there is a *deemed* notice to treat; (c) (put shortly) where there is an offer to negotiate to purchase.]"

That definition shows that the word "proposed" refers to the proposal contained in an actual or deemed notice to treat or in an offer to purchase. That gives a good clue to the *date* of the proposal. It is the date of the actual or deemed notice to treat or of the offer to purchase, as the case may be.

In the light of that definition, s. 17 (4) means that the planning authority must form an opinion as to what planning permission might reasonably have been expected to be granted at the date of the *actual* notice to treat, or the *deemed* notice to treat, or the *offer* to purchase, as the case may be. In the present case, therefore, which is a case of a *deemed* notice to treat, s. 17 (4) must be read: "that might have been expected to be granted [at the date of the service of the deemed notice to treat] in respect of the land in question, if it were not proposed [at that date] to be acquired". The planning authority must form an opinion as to what planning permission might reasonably be expected at that date, namely, 29th September 1965. It must look at the position as at that date, and see, in the circumstances then existing, whether planning permission might reasonably be expected to be granted.

Looking at this long narrow strip as at 29th September 1965 I think that the Minister was entitled to find that planning permission could not reasonably be expected for residential development. There was no profitable development open to it. He was, therefore, right to issue a nil certificate. And the judge was right to affirm his decision.

I notice that on 13th February 1969 WILLIS, J. took the same view of s. 17 (4). In *Adams and Wade Ltd. v. Minister of Housing and Local Government* (1) he followed BROWNE, J., in the present case and looked to see what was the position at the date of the deemed notice to treat. Both these judges are very experienced in this field, and I am glad to accept their views. I would dismiss the appeal.

SACHS, L.J.: This appeal raises a point of construction the resolution of which seems to me more than usually difficult in a field of statute law remarkable for its complexity. All the experienced counsel in this court ask us in effect to ignore anomalies that might be created by the decision, and indeed that appears to have been the view of BROWNE, J., and has again been repeated by LORD DENNING, M.R. That view is not exactly a compliment to the legislation, but it is one that one cannot ignore.

The terms of s. 17 (4), of the Land Compensation Act 1961 so far as relevant, relate to the giving of a certificate—

“... stating ... the opinion of the local planning authority regarding the planning permission that might have been expected to be granted in respect of the land in question, if it were not proposed to be acquired by any authority possessing compulsory purchase powers ...”

Of those certificates that which is referred to in para. (b) is—

“that planning permission could not reasonably have been expected to be granted for any development other than the development (if any) which is proposed to be carried out by the authority by whom the interest is proposed to be acquired.”

In this particular case it was such a certificate that was granted; it is one known as a nil certificate, as opposed to the valuable certificate referred to in para. (a) which precedes it. In substance, the question for the court is as to the basis on which the planning authority has to approach the question “why planning permission could not reasonably have been expected”. Does one look at the reason or cause of lack of expectation of that permission, assessing the situation as a whole (as is both applicants’ contention)? Or does one simply look at the fact that at the time of the s. 17 (4) appraisal there has been the particular refusal to develop which in this case led up to the giving of the deemed notice to treat. That is the contention put forward on behalf of the Minister, and counsel for the Minister did not hesitate to submit that one never looks at the cause of the decision to refuse, and one does not consider whose fault it was that gave rise to that decision.

There one has the two rival contentions. On that of the Minister one only looks at the date of the notice to treat, and in practice must regard as the sole cause of the lack of expectation the particular refusal of the Minister in December 1964—a decision given on the grounds of visual detriment to the houses which had been erected by the applicants Wimpeys themselves between 1956 and 1964. On both applicants’ contention one should look at the situation as a whole and find out what was the substantial cause of that situation. On that basis one would come to the view that the substantial cause of the situation was as follows:

(1) (1969), 209 Estates Gazette 1197.

that for good reason the local authority, having "indicated"—and I use that word because it appears in s. 9 of the Act of 1961 and s. 138 (1) (c) of the Town and Country Planning Act 1962—their intention to use the relevant land for a road, they later, equally for good reason, changed their mind. Insofar as the applicants Wimpeys contributed to the situation which caused the refusal of permission in December 1964, they did so by building on the residential land which they had acquired in a way to which they had been led by the course the authorities took of initially earmarking or sterilising the relevant land for road purposes. One view is blinkered, the other wide.

Before coming back to the question of construction, it is perhaps as well to record and dispose, if that can be done, of some of the points which were raised in the course of the submissions. First of all, there were submissions on both sides as to merits. As regards the case of the applicants Wimpeys, they acquired the land in 1956, when the future use of the relevant part of their land had already been earmarked—or perhaps I should say indicated—in the way already described: no doubt the price they paid for the land was not unrelated to that factor, and, of course, it can well be said there is no hardship in their case. In the case of the applicants Jelsons, this was property which was owned by them or their immediate predecessors in title, the Jelson family, already long before the authorities indicated that this part of their land might be used for roadway purposes. That is a different case. Again there may well be other cases which may arise in the large number of instances in which roadway plans are changed from time to time throughout the country. In those cases it may well be that quite considerable hardship for some owners of land will be involved. But, as already stated by LORD DENNING, M.R., one does not deal with cases on merits when one is solely concerned with construction.

The next series of points to be noted were contentions (which appear on balance to have been accepted by BROWNE, J.) that one should look at Part 2 and Part 3 of the Act of 1961 being components of a coherent whole and try to avoid inconsistencies between the two parts. Well, if that be the right approach, of course then one would look at s. 9 in Part 2, which specifically enjoins a disregard for any depreciation in value of a relevant interest attributable to the facts—

"... that an indication has been given that the relevant land is or is likely to be acquired by an authority possessing compulsory purchase powers."

That is a phrase which, as previously mentioned, appears also in s. 138 (1) (c) of the Act of 1962. Insofar as the interests of consistency are involved, it would appear to me that both applicants' contentions tend more to consistency between the two parts than that of the Minister.

Thirdly, one comes across a curious factor. It was rightly conceded by counsel for the Minister that if both applicants had in 1956 made application for a certificate and had there then been in force—of course, this is an assumption—the legislation which is now current, then both applicants would in fact have been entitled to a valuable certificate under s. 17 (4) (a).

Next, there is another curious factor. If notice to treat had been given by either of the applicants before they built houses—and again one must assume that current legislation was in force—then as far back as any rate, as 1956 they would each have been entitled to compensation for refusal to develop, and they would have got that compensation on the basis that this strip of land was part of an area for residential development.

Next, I would mention—although only to dismiss them—the points that were raised as to the date of valuation and the difficulties of valuation if both applicants' contentions were accepted. To my mind they are quite distinct from the issue

whether a certificate could reasonably have been expected but for the factors mentioned in sub-s. (4). Questions of date and difficulties of valuation can only arise after and subject to there having been a decision on sub-s. (4).

Finally, from amongst the points that have been canvassed it is perhaps as well to refer to the decision of *Adams and Wade, Ltd. v. Minister of Housing and Local Government* (1) given by WILLIS, J., on 13th February 1969. It is relevant simply to quote one sentence in the Minister's findings which reads as follows:

"This proposal [and, of course, it refers to the proposal relevant to that case] would necessarily involve the siting of houses in undesirable close proximity to the trunk road [a long established trunk road in that case] and would be unacceptable on this account."

To my mind the facts in the *Adams and Wade* case are wholly distinguishable from the facts of the current case, and it seems to me that WILLIS, J., recognised that when he mentioned in his judgment—

"... it is because the applicants were unwilling to fulfil the condition subject to which permission was originally granted [to keep the strip as an amenity strip by the trunk road] that they are requiring the local authority to acquire the land."

Nonetheless, it is the fact that WILLIS, J., stated his agreement with the views of BROWNE, J., in relation to the relevant question of construction.

Those factors having been mentioned, it seems to me that one has to consider the construction here stripped of them and come back to the question as to the meaning of the relevant words in s. 17 (4) in the context of s. 17 as a whole. In this respect I recognise the danger of the construction put forward by the Minister bringing into para. (b) a great many sets of facts which may not have been contemplated should come within it. Nonetheless, it is a matter in the end of what do the words mean.

I find myself in the difficulty of being unable to see a wholly satisfactory answer on pure construction to the way that LORD DENNING, M.R., has just put the matter. In that behalf I would mention also that in s. 17 (3) on finds these words:

"An application under this section made by either of the said parties—
(a) shall specify one or more classes of development appearing to the applicant to be classes of development which would be appropriate for the land in question if it were not proposed to be acquired by any authority possessing compulsory purchase powers; ..."

That seems to me to be a subsection which relates definitely to the existing state of affairs. In those circumstances without enthusiasm and not without hesitation I find myself impelled to concur in the reasoning of LORD DENNING, M.R., coupled, I may add, with that of two judges of very considerable experience in a field which seems to me very much more complex than perhaps it was to them. I concur that the appeal should be dismissed.

PHILLIMORE, L.J.: The proposed ring road was shown on the development plan for Leicester in 1951 and remained on it until 1962 or 1963 when the plan for a ring road was abandoned. The land shown on the plan as belonging to the applicants Jelson, Ltd., was acquired by them after that company was formed in 1954; the land owned by the applicants George Wimpey & Co., Ltd. was bought in 1956. Thereafter each of these applicants proceeded to develop and by putting houses close to the proposed site of the ring road left only the

(1) (1969), 209 Estates Gazette 1197.

narrow strip required for the road itself. If they had been less economical in their use of the land, the strip might well have been capable of residential development today. As it was, when both applicants sought leave in 1964 to develop their respective parts of the strip it was refused. They then served the planning authority with notice requiring them to purchase the strip in accordance with s. 129 of the Town and Country Planning Act 1962 on the ground that the land had become incapable of reasonable beneficial use in its existing state. The respondent district council refused to purchase, but both applicants appealed successfully to the Minister. The Minister confirmed the application requiring the respondent district council to purchase, and accordingly the date of his decision, 28th September 1965, is deemed to be the date of notice to treat. Both applicants complain that in dealing with their subsequent application under s. 17 of the Land Compensation Act 1965 the Minister in granting a nil certificate looked only to the position as at the date of the deemed notice to treat. It is said it is quite unfair because but for designating this strip as reserved for a ring road, throughout the vital years both applicants would have got a value certificate for compensation on the basis that this land was fit for residential development. Can one look back to past events and consider the factors which brought about the state of the land as it is at the date of notice to treat? BROWNE, J., held that you could not. WILLIS, J., followed that view in *Adams and Wade, Ltd. v. Minister of Housing and Local Government* (1). Counsel for the Minister has argued to the same effect. He has taken us through the various sections of the Land Compensation Act 1961 pointing to the constant references to the date of the notice to treat, as clearly affecting the question of compensation. LORD DENNING, M.R., has also referred to the strong support to be derived from the words of s. 22 of the Act. In my judgment BROWNE, J., and WILLIS, J., were right and counsel for the Minister's argument is right. An important factor is that, apart from the question of construction, once one starts looking back, the whole exercise becomes hopelessly uncertain. Did it all result from the designation of this strip as required for the ring road? How far was the state of the land due to both applicants' own action in building right up to the strip? Could they have avoided loss by serving notice to purchase in 1959 when the provisions of the Act of 1961 were first erected? Have they really suffered any loss, or did they pay for the strip on the basis that it was blighted land? At any rate, when they acquiesced they knew this to be the case. It seems to me that to look back beyond the date of the deemed notice to treat would open up a considerable field for guesswork which would often make it impossible to give firm advice to any member of the public as to his rights. Accordingly, both as a matter of construction and on wider grounds, I would dismiss these appeals.

Appeals dismissed.

Solicitors: *Kingsford, Dorman & Co.*, for *Holyoak & Co.*, Leicester; *Kingsford, Dorman & Co.* for *W. B. Farmbrough*, Nottingham; *Solicitor, Ministry of Housing and Local Government.*

F.G.

(1) (1969), 209 Estates Gazette 1197.

COURT OF APPEAL (CRIMINAL DIVISION)

May 2, 13, 1969

R. v. LOVESEY. R. v. PETERSON

Criminal Law—Robbery with violence and murder—Summing-up—Direction that offences stood or fell together—No direct evidence of number of men involved in attack or of their individual roles—Common design to rob—Question whether common design involved use of such force as would include killing or infliction of grievous bodily harm not left to jury—Convictions of murder quashed—No power to substitute verdict of guilty of manslaughter.

The appellants were convicted of both offences on an indictment which charged both of them with robbery with violence and with murder. The case for the prosecution was that the appellants were among a number of men who had robbed a jeweller and in the course of the attack had inflicted injuries on him as the result of which he died. There was no direct evidence of the number of men involved in the attack or of their individual roles and there was no direct evidence to connect either of the appellants with the attack, though there was circumstantial evidence. The appellants' defence was a denial of all knowledge of the attack. The jury, after having been correctly directed on the ingredients of both offences and on participation in a common design, were further directed that the offences stood or fell together.

HELD: that this was a misdirection necessitating the quashing of the convictions for murder, since, it being impossible to identify the part of either appellant in the attack, neither could be convicted of an offence which went beyond the common design to which he was a party; and though there was clearly a common design to rob, the question had not been left to the jury whether that common design further involved the use of such force, including killing or the infliction of grievous bodily harm, as was necessary to effect the robbery or secure escape without fear of subsequent identification; the court could not substitute a verdict of manslaughter because, if a common design to inflict grievous bodily harm had not been established, the jury could have taken the view that the killing was the unauthorised act of one adventurer for which his co-adventurers were not responsible.

APPEALS by John Dennis Lovesey and Anthony Peterson against their convictions at the Central Criminal Court on an indictment charging them with robbery with violence and with murder, they being sentenced to seven years' imprisonment for the robbery and to life imprisonment for the murder, with a recommendation in respect of the latter offence of a minimum period of 20 years.

C. L. Hawser, Q.C., and V. K. Winstain for the appellants.

J. H. Buzzard and M. Mansfield for the Crown.

Cur. adv. vult.

13th May. **WIDGERY, L.J.**, read this judgment of the court: The two appellants were convicted at the Central Criminal Court of robbery with violence (count 1) and murder (count 2). They were each sentenced to imprisonment for seven years and for life on the two counts respectively, and now appeal against their convictions of murder by leave of the full court.

The victim was a jeweller, who was accustomed to open his lock-up shop at about 9.0 a.m. and who was normally alone in the shop until the arrival of his wife at about 9.10 a.m. On 24th January 1968, he arrived at his shop at about 9.0 a.m., and when his wife found him some 15 minutes later he was handcuffed to a railing in the basement of the premises and had suffered severe head injuries, from which he later died. Blood was found on the ground floor and on the stairs, the shop was in disorder, and some cases of valuables had been removed. There was no direct evidence of how many men had been involved in the raid or of the parts which they had individually played. The appellants denied all knowledge of the affair, but the prosecution sought to implicate them in the crime in a

number of ways. Witnesses were called to prove a connection between the two appellants and a Jaguar car which was thought to have been used in the raid, and the victim's daughter gave evidence that the appellant Lovesey had visited the shop with a woman three months before. Evidence was also given that when the appellants were arrested the two halves of a torn envelope, which had come from the shop, were found in their respective pockets. The appellants made many complaints about this evidence, and the directions given by the trial judge thereon, but these matters have all been disposed of in an earlier judgment of the court, and all which now remains is the appellants' appeal against their convictions for murder, the ground of appeal being that the trial judge failed to direct the jury to consider the two counts separately.

The learned judge gave the jury an impeccable direction on the ingredients of the offence of robbery with violence and on the guilt of individuals who join in a common purpose to rob. He continued:

"Then comes the second and the more important charge, namely, murder, and that arises in this particular case and on this evidence in this way: if a man is attacked with the intention of causing him really serious physical injury and as a result of that injury he dies, he or any who became party to that attack, if they joined in for the purpose that he should suffer serious physical injury, are guilty of murder. Again, the same observation applies: if one is keeping watch outside or sitting in the car, once you are satisfied that the offence has taken place, and they are all acting with that common purpose and it resulted in death and that there was in the mind of all of them an intention to do really serious physical harm, then there is the offence of murder."

In our view, the direction is not open to objection up to this point; but the learned judge concluded this part of the summing-up with these words:

"So much, members of the jury, for the offences that you have got to consider in this case, and in the particular circumstances of this case, as [counsel for the Crown] said, and I think everybody agreed, obviously these two offences stand or fall together."

In fact, the two offences did not necessarily stand or fall together. As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification), even if this involved killing, or the infliction of grievous bodily harm on the victim. If the scope of the common design had been left to the jury in this way, they might still have concluded that it extended to the use of extreme force. It is clear that the plan envisaged that the victim's resistance should be rapidly overcome. The attack bears the hallmark of desperate men who knew that they had to act quickly, and the jury may have thought it utterly unreal that such men would make a pact to treat the victim gently however much he struggled and however long it might take to subdue him. The jury had also had the advantage of seeing the appellants in the witness box and may have formed their own views whether the appellants would have scruples of this character. There must, in our view, be many cases of this kind where the jury feel driven to the conclusion that the raiders' common design extended to everything which in fact occurred in the course of the raid, but the question must be left to the jury because it is a matter for them to decide, and this is so notwithstanding that the point was not raised by the defence.

Counsel for the Crown has invited us to consider the substitution on count 2 of a verdict of manslaughter under s. 3 of the Criminal Appeal Act 1968. It is clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all the co-adventurers guilty of manslaughter if the victim's death is an unexpected consequence of the carrying-out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act (*R. v. Anderson and Morris* (1)). In the present case if the degree of violence used against the victim showed a clear intention to inflict grievous bodily harm, and if this was within the common design the proper verdict against all concerned was one of murder. We cannot say that the jury must have reached this conclusion and, accordingly, feel compelled to quash both convictions for murder. Having reached this point we are unable to substitute verdicts of manslaughter since, if a common design to inflict grievous bodily harm is excluded, the jury might well have concluded that the killing was the unauthorised act of one individual for which the co-adventurers were not responsible at all. Both appeals are accordingly allowed, and the convictions on count 2 are quashed.

Appeals allowed.

Solicitors: *Quirke & Co.; Director of Public Prosecutions.*

T.R.F.B.

(1) 130 J.P. 318; [1966] 2 All E.R. 644; 2 Q.B. 110.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., MEGAW, L.J. AND NIELD, J.)

May 19, 1969

R. v. BIRTLES

Criminal Law—Police—Use of informer—Disclosure to court of existence of informer—Informer not to incite others to commit offence—Participation by informer in offence already planned.

Where the police make use of the services of an informer, there is no duty on them to disclose the fact that an informer has been employed, but they must never conceal facts which go to the quality of the offence. An informer must never be allowed to incite others to commit an offence which otherwise they would not have committed, and the police must never take part in carrying out such an offence. But the police are entitled to avail themselves of information regarding an offence already laid on. In such a case the police are entitled, and it is their duty, to mitigate the consequences of the offence, e.g., to protect the proposed victim, and it may be perfectly proper for them to encourage the informer to take part in the offence, or, indeed, for a police officer to do so.

APPEAL against sentence by Frank Alexander Birtles, who at West Riding, Yorkshire, Quarter Sessions with another man pleaded guilty to burglary and carrying an imitation firearm, contrary to s. 1 of the Firearms Act, 1965, and was sentenced to three years' and two years' imprisonment consecutive.

D. M. Savill, Q.C., and M. C. M. Hagan for the appellant.

R. Lyons, Q.C., and Barbara Woodliff for the Crown.

LORD PARKER, C.J., said that the court would reduce the appellant's total sentence by making the two sentences run concurrently instead of consecutively. The court took the view that it was possible that the appellant had been encouraged to commit the offences to which he had pleaded guilty by an informer and a police officer. His LORDSHIP continued: Before leaving this case, the court would like to say a word about the use which, as the cases coming before the court reveal, is being made of informers. The court of course recognises that, disagreeable as it may seem to some people, the police must be able in certain cases to make use of informers, and further—and this is really a corollary—that within certain limits such informers should be protected. At the same time, unless the use made of informers is kept within strict limits, grave injustice may result. In the first place, it is important that the court of trial should not be misled. A good example of that occurred in *R. v. Macro* (1), again a raid on a sub-post office, which came before this court on 10th February, 1969. There the charge was one of robbery with aggravation with a man unknown. In fact, the man unknown was an informer who together with the police had warned the victim of what was going to take place, and had gone through the pretence of tying-up the victim while the police were concealed on the premises. The effect was that the appellant in that case pleaded guilty to an offence which had never been committed. If the facts had been known, there could not have been a robbery at all, and accordingly it was for that reason that the court substituted the only verdict apt on the facts which was open to it, namely, a verdict of larceny. There is of course no harm in not revealing the fact that there is an informer, but it is quite another thing to conceal facts which go to the quality of the offence. Secondly, it is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed. It is another thing for the police to make use of information concerning an offence already laid on. In such a case the police are clearly entitled, indeed it is their duty, to mitigate the consequences of the proposed offence, for example, to protect the proposed victim, and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for a police officer himself to do so. But it is quite another thing, and something of which this court thoroughly disapproves, to use an informer to encourage another to commit an offence or indeed an offence of a more serious character, which he would not otherwise commit, still more so if the police themselves take part in carrying it out. In the result, this appeal is allowed and the sentence reduced to one of three years.

Appeal allowed.

Solicitors: *Registrar of Criminal Appeals; Director of Public Prosecutions.*

T.R.F.B.

(1) (1969), *The Times*, 11th February

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, L.J., MELFORD STEVENSON AND JAMES, JJ.)

June 3, 1969

R. v. BLAKEWAY

Criminal Law—Sentence—Suspended sentence—Time for deciding whether to be concurrent with or consecutive to earlier suspended sentence—Suspended sentence not to be made consecutive to suspended sentence not being put into force—Criminal Justice Act, 1967, s. 40.

A suspended sentence cannot be made consecutive to an earlier suspended sentence which is not then being put into force. The time for deciding whether a suspended sentence should be concurrent or consecutive is the time when the matter is before the court to be dealt with under s. 40 of the Criminal Justice Act, 1967, by way of implementation.

APPLICATION for leave to appeal against sentence.

The applicant, Thomas Joseph Blakeway, pleaded guilty at Warley Quarter Sessions, on Nov. 20, 1968, to storebreaking with intent and receiving and was sentenced to six and three months' imprisonment on each count, the sentences to be consecutive. In addition the court ordered to come into effect, concurrently with each other, two terms of six months' imprisonment suspended on 11th April 1968 and 1st August 1968 respectively, and made them consecutive to the sentences of six and three months imposed for the offences of storebreaking and receiving, so that the applicant was sentenced to 15 months' imprisonment in all.

The applicant did not appear.

No counsel appeared.

JAMES, J., delivered this judgment of the court: The applicant, Thomas Joseph Blakeway, was convicted at Halesowen Magistrates' Court on 11th April 1968 of stealing scrap copper wire, for which offence he was fined and sentenced to six months' imprisonment suspended for three years. On 1st August 1968 at Warley Quarter Sessions for an offence of factorybreaking and stealing, committed during the operational period of the suspended sentence already mentioned, he was sentenced to six months' imprisonment suspended for 12 months. On that occasion the court made no order in respect of the suspended sentence passed on 11th April, the court exercising its power under s. 40 (1) (d) of the Criminal Justice Act 1967.

Prior to his appearance at Warley Quarter Sessions on 1st August, but during the operational period of the sentence passed on 11th April, namely, on 23rd July 1968, the applicant broke into a warehouse in Warley by way of the skylight with intent to steal. He stole nothing, but he left behind certain articles of his own, which enabled him to be identified with the offence, namely, a key and a snuff box.

On 14th August 1968—that is during the operational period of both suspended sentences—the applicant and another person were arrested. The other man was in possession of a clock and a kettle, which he had stolen on the previous day. The applicant was acting as adviser and participator in the disposal of those articles, which he knew were stolen goods, at the request of the thief. His conduct amounted to receiving stolen goods by virtue of the provisions of s. 4 (7) of the Criminal Law Act 1967. On 20th November 1968 at Warley Quarter Sessions the applicant pleaded guilty to the offence of warehousebreaking with intent on 23rd July and to receiving stolen goods on 14th August. He further admitted and asked to have taken into consideration two offences of breaking

into premises and stealing and one offence of breaking and entering with intent to steal, both committed on 2nd February 1968.

He was sentenced to six months' and three months' imprisonment consecutive on the counts to which he pleaded guilty, and the recorder further said:

"... insofar as the previous suspended sentences are concerned, in the absence of the indictment and contrary to my own recollection I am going to deem them as concurrent sentences, in other words, I am either going to deem or going to order as the case may be, that the suspended sentences you received here and the suspended sentence that you received at Halesowen, shall be regarded as concurrent... I am going to deem those or order them to be concurrent so that there will be a further six months to serve... That makes 15 months in all."

The applicant now seeks the leave of this court to appeal against his sentence. He has abandoned his application for leave to appeal against conviction after refusal of leave by the single judge. The matter of sentence was referred to the full court by the single judge as it appears at first sight that there may be some abnormal features in regard to the method by which the suspended sentences were dealt with in this particular case. The applicant's contention is that on the occasion of 1st August at Warley Quarter Sessions the recorder told him that the first suspended sentence that he had received at the magistrates' court [at Halesowen] was invalid, and it was because of that ruling that the recorder took no action in respect of that sentence and passed a second new suspended sentence. It is quite certain that the applicant is mistaken in that belief. The recorder expressed his own recollection of the occasion to be that he was making the sentence he then passed suspended to be consecutive; and when he was specifically asked by counsel if, in making the period consecutive, he was referring to the operational period or the sentence he replied: "No, to six months being consecutive". So clearly there was no declaration that the first suspended sentence was invalid; indeed, the recorder would not have had any jurisdiction so to declare.

The recorder's recollection of making the second suspended sentence consecutive, if accurate, would in the view of this court amount to a falling into error in that respect, because one cannot have a suspended sentence made consecutive to a suspended sentence which is not then being put into force. The time for deciding whether a suspended sentence should be concurrent or consecutive is the time when the matter is before the court to be dealt with under s. 40 of the Criminal Justice Act 1967 by way of implementation, not at the time when the suspended sentence is first passed. When one looks at this matter in detail, it is quite clear that the learned recorder, in making the implementation of the suspended sentences concurrent, did so in the interests and to the advantage of the applicant. It was possible for him to have made them consecutive when he implemented them. In fairness to the applicant, there being some doubt as to what was said on previous occasions, he made them concurrent. There is no error in principle, therefore, in the way in which the suspended sentences were dealt with.

There is only one other matter that need be mentioned in case there is any doubt left in the applicant's mind in this case, and that is the approach that the recorder made, when passing sentence, to the assessment of the sentence for the principal offences with which he was dealing and to the implementation of the suspended sentences. In passing sentence the recorder (as appears quite clearly from the transcript) first of all assessed the sentence for the offences on the indictment. Having done that, he then applied his mind to the question of

the suspended sentences. That method of approach is in accord, in fact, with the decision of this court in *R. v. Ithell* (1) decided on 17th January 1969, subsequent to the hearing of this case before the recorder. The endorsement on the indictment in this case, however, erroneously records the sentences the wrong way round. It falsely shows that the recorder first dealt with the suspended sentences and then passed consecutive sentences on the substantive offences. The transcript shows that to be an error, and the recorder in fact dealt with the matter perfectly properly and in accordance with the decision of this court.

There is nothing wrong in principle here, the sentences were not excessive in any way, and the application is refused.

Application dismissed.

T.R.F.B.

(1) Ante p. 371; [1969] 2 All E.R. 449.

HOUSE OF LORDS

(VISCOUNT DILHORNE, LORD MACDERMOTT, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST AND LORD UPJOHN)

February 1, 2, 6, 7, March 15, 1967

ATHANASSIADIS v. GOVERNMENT OF GREECE

Habeas Corpus—Grant of writ—Illegality of detention of applicant—Application based on illegality—Technicality.

An application for a writ of habeas corpus should not necessarily be granted where the ground of the application is the illegality of the detention of the applicant and that ground is based on a mere technicality not affecting the merits of the case.

Extradition—Arrest—Termination if condition in treaty not satisfied within "three months"—Calendar months.

By art. 15 of the Extradition Treaty entered into between Great Britain and Greece in 1910: "If a fugitive criminal who has been arrested has not been surrendered . . . within three months after his arrest . . . he shall be set at liberty".

HELD: while the meaning of language used in a treaty was not to be interpreted as if an Act passed in the territory of one of the Powers governed it, it did not follow that a rule of construction applicable under the law of one Power in relation to legal documents, e.g., the English common law rule that "month" means lunar month, was to be applied in relation to it; in each case the intention of the treaty must be considered.

Extradition—Person accused or convicted of offence within territory of State seeking extradition—"Within territory"—Evidence.

By art. 1 of the Extradition Treaty entered into between Great Britain and Greece in 1910, provision was made for the extradition of persons accused or convicted of certain crimes or offences "committed in the territory of the one party" to the treaty.

HELD: to bring a case within this article it must appear on the evidence that the offence was committed within the territory of the State seeking extradition; it was not sufficient that the evidence was consistent, or not inconsistent, with the offence having been committed within that territory.

APPEAL by Thomas Athanassiadis from the dismissal by a Divisional Court of the Queen's Bench Division of an application by him for a writ of habeas corpus directed to the governor of Brixton Prison wherein he was detained under an order of the Chief Metropolitan Magistrate.

J. P. Comyn, Q.C., and G. A. Zaphiriou for the appellant.

Leonard Caplan, Q.C., and J. M. Cope for the government of Greece.

Nigel Bridge for the Home Secretary and Governor of Brixton Prison.

Their Lordships took time for consideration.

15th March 1967. The following opinions were delivered.

VISCOUNT DILHORNE: My Lords, on 3rd June 1966, an information was laid by Detective Sergeant Martin at Bow Street Magistrates' Court stating that the appellant was "accused of the commission of the crime of fraud within the jurisdiction of the government of Greece". The detective sergeant said that he had been informed that a warrant had been issued in Greece for the appellant's arrest. He asked that a warrant might be issued under the Extradition Act 1870 for the appellant's arrest as there were reasonable grounds for supposing that the appellant might escape during the time necessary to present the diplomatic requisition for his surrender. A warrant was issued. On 3rd June the appellant was arrested. He was brought before the magistrate on 4th June and remanded in custody. He continued to be remanded in custody until 13th August 1966.

In 1910 a treaty was made between Great Britain and Greece for the mutual extradition of fugitive criminals. The Extradition Act 1870, by s. 2, provides that where such an arrangement has been made, Her Majesty may, by Order in Council, direct that the Act shall apply in the case of the foreign State. Power is given by this section to limit the operation of the order and to render its operation "subject to such conditions, exceptions, and qualifications as may be deemed expedient". An Order in Council applying the Act in the case of Greece was made on 13th February 1912. That order contained the terms of the treaty and provided that the Extradition Acts should apply in the case of Greece "under and in accordance with" the treaty. Under the Extradition Acts a foreign State may issue a requisition for the surrender of a person either on the ground that he is accused of a crime for which under the treaty with that State and the Extradition Acts he may be extradited or on the ground that he has been convicted of such a crime.

Article 8 of the treaty with Greece provides that a requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent judicial authority and by such evidence as, according to the laws of the place where the accused is found, would justify his arrest if the crime had been committed there. This article further provides that if the requisition relates to a person already convicted, it must be accompanied by a copy of the judgment passed on the convicted person by the competent court of the State making the requisition.

Article 9 makes provision for cases of urgency. Its terms, so far as they are material, are as follows:

"In cases of urgency provisional arrest may be effected upon notice being given . . . that one of the documents enumerated in Article 8 has been issued . . . Provisional arrest shall be effected in the manner and in accordance with the rules laid down by the laws of the State applied to. It shall not be maintained if, within a period of one month from the date on which it has been effected, the State applied to has not been furnished with one of the documents specified in art. 8 . . ."

It was not disputed that this article applied in relation to the arrest of the appellant on 3rd June. It follows that, unless one of the specified documents had been furnished by 3rd July, if "month" in this article meant a calendar month, or by 1st July if it meant a lunar month, the appellant should, if the treaty was to be complied with, have been set at liberty.

Counsel for the appellant, contended that no specified document had been furnished to Great Britain within a month of the arrest and that therefore the appellant should have been released; and that the failure to release him invalidated the warrant for his committal with a view to surrender issued by the magistrate on 13th August 1966.

On 10th June, a week after the appellant had been arrested, the Greek embassy sent to the Foreign Secretary a note verbale informing him that a requisition for the extradition of the appellant would be sent to him as soon as the documents provided for in art. 8 of the treaty of 1910 had reached the embassy from Athens; and requesting that the appellant should be placed under provisional arrest. By this note verbale "official notices" were given that the appellant had: (a) been convicted of fraud and sentenced to three years' imprisonment by the Correctional Court of Piraeus (judgment 3680 dated 31st May 1965); (b) been convicted of fraud and sentenced to 20 months' imprisonment by the Correctional Court of Athens (judgment 30521 dated 20th December 1965); and (c) been arraigned by the Chamber of the Correctional Judge to be tried before one of the criminal courts for causing a shipwreck. On 27th June 1966, the Foreign Secretary sent a note to the Greek ambassador asking that "supporting evidence for the extradition of" the appellant " (or at least the warrant of arrest issued in Greece . . .) " should be forwarded to him to reach him no later than 30th June "... since if the documents are not produced to the court by the 1st of July, the prisoner will be discharged in accordance with the provisions of article 9" of the treaty. On 30th June a further note verbale was sent to the Foreign Secretary by the Greek embassy. It made formal application for the extradition of the appellant and sent with it was decision 482 of 16th March 1965, of the correctional judges of Piraeus arraigning the appellant on the charges contained therein and ordering his arrest. This decision shows that the appellant was charged with being the moral instigator of causing a shipwreck and the moral instigator of perjury by certain customs officials.

A moral instigator under the Greek Penal Code appears to be one who counsels and procures the commission of the act. By s. 3 of the Extradition Act 1873—

"Every person who is accused or convicted of having counselled, procured . . . the commission of any extradition crime . . . shall be deemed, for the purposes of the principal Act [the Act of 1870] and this Act, to be accused or convicted of having committed such crime . . ."

It will be noted that decision 482 did not charge the appellant with the commission of the crime of fraud, although the warrant for his arrest in this country has been issued on the ground that he was accused of that crime and in the belief that a warrant had been issued in Greece for his arrest on that account.

On 1st July a letter was sent from the Home Office to the magistrate referring to the appellant—

"who was apprehended on 3rd June 1966 under a provisional warrant . . . for the crime of fraud committed within the jurisdiction of the government of Greece"

and stating that the Secretary of State had that day received one of the documents specified in art. 8 of the treaty of 1910—

"and that it would therefore appear that the provisional arrest may be maintained in accordance with the provisions of article 9 of the said treaty."

The appellant, as I have said, continued to be remanded in custody after 3rd July.

Article 2 of the treaty provides that—

“Extradition shall be granted for the following crimes or offences when provided for by the laws of the requisitioning State and of the State applied to.”

There follows a list of crimes. The article concludes with the statement:

“Participation in the aforesaid crimes is also included, provided that such participation is punishable by the laws of the demanding State and of the State applied to.”

The English text does not contain the offence of causing a shipwreck but does contain perjury.

Counsel for the Greek government contended that decision 482 amounted to a warrant for the appellant's arrest, *inter alia*, for perjury and as that was under the treaty an extraditable crime, the warrant of arrest constituted one of the documents specified in art. 8 so that the requirement of art. 9 was complied with and the appellant's arrest could be maintained after 3rd July.

I do not think that this contention is well founded. The treaty envisages that ordinarily the process of extradition is to be initiated by a requisition by the State seeking to obtain the extradition and that that requisition is to be accompanied by the necessary supporting documents. Article 9 of the treaty makes, as I have said, provision for cases of urgency and enables an arrest to be made before any of the supporting documents have been received but it provides that, unless one of the specified documents is received within a month of the arrest, the arrest is not to be maintained. In my view, it is clearly implied that the specified document which has to be received within the month, must be a document required to support the charge or conviction which has led to the warrant for arrest being issued in this country. In fact, no document specified in art. 8 was received within one month in support of the charge of the commission of the crime of fraud. In my view, it is clear that under art. 9 of the treaty the arrest of the appellant should not have been maintained.

Counsel for the appellant contended as I have said, that if this were so, the magistrate had no power to commit the appellant to prison with a view to his surrender. In my opinion, this conclusion does not follow from the fact that under art. 9 of the treaty he should have been released a month after his arrest.

On 18th July 1966, a further note verbale was sent by the Greek embassy to the Foreign Secretary. With this note in support of the application made on 30th June for the extradition of the appellant were sent judgment 3680 of 31st May 1965, of the Court of Piraeus and judgment 30521 of 20th December 1965, of the Court of Athens (which were referred to in the note verbale of 10th June 1966, requesting the appellant's provisional arrest) and official translations of them in the French language. On 22nd July the Home Secretary sent to the Chief Magistrate an order, as he was empowered to do by s. 7 of the Extradition Act 1870 when he had received a requisition for extradition, informing him of the receipt of the requisition and requiring him to proceed in accordance with the Extradition Acts. On receipt of such an order, the magistrate is given power, by s. 8 of that Act, to issue a warrant for the arrest of the person sought to be extradited if in his opinion there is evidence such as would justify the issue of a warrant if the crime had been committed or the criminal convicted in England. The procedure envisaged by the Act is that after a person's apprehension on such a warrant he will be brought before the magistrate to show cause why he should not be surrendered. The issue of the warrant for his arrest is part of the machinery for securing his appearance before the court. In this case it was not necessary to

issue a warrant for his apprehension on receipt of the order from the Home Secretary as he was already in custody.

On 8th August the appellant was brought before the Chief Magistrate to show cause why he should not be surrendered—

“on the ground of his being convicted of the commission of the crime of fraud as set out in judgment 3680”

of the Court of Piraeus, and, he having failed to show cause, on 13th August the Chief Magistrate issued a warrant committing him to Brixton Prison with a view to his surrender. It will be noted that he was committed not on account of being charged with the crime of fraud, the ground for the issue of the warrant for his arrest on 3rd June, but on account of his conviction of fraud.

If the procedure had started with the note verbale of 18th July requesting his extradition on account inter alia of this conviction, the only respect in which the procedure laid down by the Extradition Act was not followed was in not issuing a further warrant for his arrest. If that had been done, I do not see that there could have been any complaint arising out of his arrest on 3rd June as to the validity of his committal for surrender.

In the circumstances of this case the issue of a writ for his arrest when he was in custody was unnecessary—as unnecessary as would be the issue of a warrant for the arrest of a person serving a sentence of imprisonment.

In *R. v. Governor of Brixton Prison, Ex p. Servini* (1), where it was held that the mere omission to give formal proof of the Order in Council applying the Extradition Act did not entitle the prisoner to be released, RIDLEY, J., said:

“It is in my opinion undesirable to apply the writ of habeas corpus to a case of this kind—a case where a mere technicality not affecting the merits is the only point raised.”

SCRUTTON, J., said:

“... while the courts have always used the writ of habeas corpus as a very strong defence of the subject, they have always used it to effect justice. For instance, when a man has been detained under an informal and technically bad conviction and has applied for habeas corpus, the court, if satisfied that there is a *prima facie* case against him, have not released him but have recommitted him in order that he may be dealt with on the charge on which there is a *prima facie* case against him. That was decided in *R. v. Marks* (2). In *Ex p. Krans* (3) there was not even a warrant at all, but the court, being satisfied that a *prima facie* case of murder might be made against the prisoner, recommitted him in order that he might be dealt with in respect of that crime.”

BAILLACHE, J., doubted whether the point in that case was a mere technical point but agreed:

“... that the writ ought not necessarily to issue where the court is satisfied that although the applicant may not be quite regularly in custody yet substantially and on the merits he is properly in custody.”

I agree with the views expressed in this case and I do not think that the application for a writ of habeas corpus should now be granted on account of the omission to issue a warrant for arrest when the appellant was in custody. If the applicant was not lawfully in custody after 3rd July, he might have been able to obtain his

(1) 78 J.P. 47; [1914] 1 K.B. 77.

(2) (1862), 3 East, 157.

(3) (1823), 1 B. & C. 258.

release before he came before the magistrate in August, but if that were the case, it would not be in my opinion any ground for holding that the warrant of committal issued on 13th August was invalid. After the issue of the warrant, he is not entitled to his release now on the ground that he should have been released before the warrant was issued. I am of the opinion that this contention advanced by his counsel fails.

Counsel's second contention on behalf of the appellant was based on art. 15 of the treaty, which reads as follows:

"If a fugitive criminal who has been arrested has not been surrendered and conveyed away within three months after his arrest, or within three months after the decision of the court upon the return to a writ of habeas corpus in the United Kingdom, he shall be set at liberty."

He contended that "months" in this article meant lunar months and that the appellant should by virtue of this article have been set at liberty on 26th August, three lunar months from 3rd June. At common law, he said "month" means lunar month unless the Interpretation Act 1889 applies. That Act applies to all Acts passed after 1850 and provides that unless the contrary intention appears, "month" means a "calendar month". In support of this contention reference was made to *Re Frederick Gerhard* (No. 2) (1) where it was held by A'BECKETT, J., in the Supreme Court of Victoria, Australia, that—

"The meaning of the language used in a treaty between two powers is not to be regulated by the special meaning given to the words in an Act of Parliament passed by the Parliament of one of them."

He held that in that case "month" in a treaty meant lunar month.

While I agree that the meaning of language used in a treaty is not to be interpreted as if an Act passed in the territory of one of the Powers governed it, it does not, in my view, follow that a rule of construction applicable under the law of one Power in relation to legal documents, namely, the common law rule that "month" means "lunar month", is to be applied in relation to it. In each case, it seems to me, one has to consider what was the intention of the treaty. In this case it was concluded for the purpose of providing for the mutual extradition of fugitive criminals and it was clearly intended that, on the conclusion of the treaty, an order would be made under the Extradition Act 1870, applying the Extradition Acts. It is, to my mind, inconceivable that it was intended that a different interpretation should be given to the word "month" in the Acts from that given to the word in the treaty. To do so, would lead to complications. The three months period specified in art. 15 would be three lunar months. The two months within which the person sought to be extradited has to be surrendered and conveyed away, or if that is not done, released, provided for in s. 12 in the Act of 1870, would be calendar months.

In my opinion, one can safely conclude that it was the intention of the parties to the treaty that "month" should mean the same as it does in the Extradition Acts by virtue of the Interpretation Act. I think, therefore, that this contention fails.

Counsel for the Greek government, in addition to contending that month meant calendar month, also argued that art. 15 gave no right to an individual, and so the appellant had no legal right to claim his release under that article. This argument found favour in the Divisional Court. LORD PARKER, C.J., was of the opinion that art. 15 gave the appellant no legal right and it might be that he had no legal right to relief under art. 9. WINN, L.J., and WIDGERY, J.,

(1) (1901), 27 V.L.R. 484.

appear to have agreed with this view. As in my view "month" in art. 15 means calender month, it is not necessary to reach a decision on this question but I think that I should say that I doubt the correctness of this conclusion.

True it is that a treaty between two States does not confer legal rights on the individuals of the States but if the terms of the treaty are made part of the domestic law of a territory, then the position is different. Here the Order in Council made under the Act of 1870 provided that the Extradition Acts were to be applied "under and in accordance with the terms of the treaty".

WINN, L.J., agreeing with CHANNELL, J., in *R. v. Governor of Brixton Prison, Ex p. Thompson* (1), said that the Act was to be treated as incorporating the Order in Council and the treaty "and the whole three have to be read together". On this basis it seems clear to me that a strong argument can be advanced that individuals are legally entitled to rely on art. 9 and art. 15. The State requiring extradition may be willing to waive a breach of these articles. It would be an odd result, if the extraditing State was prepared to do so, if an individual of that State had no right to seek and to secure compliance with the treaty. However this may be, it is not, as I have said, necessary in this case to reach a conclusion with regard to it.

Counsel for the appellant further contended that it was the duty of the courts in this country to look behind the conviction and see whether it accorded with natural justice. That had been argued in *Re Caborn-Waterfield* (2) but it was not necessary in that case to decide whether there was any such duty. Similarly in this case it is, in my opinion, not necessary to do so, for even if it were the case that the courts have such a duty, there are no grounds for concluding that the conviction of the appellant was contrary to natural justice. The appellant was served with a summons calling on him to appear before the court of Piraeus on 31st May 1965. He chose not to appear. He cannot complain that the court proceeded to try him in his absence when that absence was of his own volition.

Section 10 of the Act of 1870 only provides for the committal of a person accused or convicted of an extradition crime. An extradition crime is defined in s. 26 as—

"a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act."

That schedule includes "Obtaining money . . . by false pretences". Counsel for the Greek government contended that the crime of which the appellant was convicted in Greece would, if committed in England, have been the crime of obtaining money by false pretences. Counsel for the appellant argued that it would not have been.

The appellant was charged before the Court of Piraeus with an offence against art. 386 of the Greek Criminal Code 1950. That article is headed 'Απάτην' the English translation of which is fraud. It reads as follows:

"Whoever with intent to obtain either for himself or for somebody else an illegal pecuniary advantage harms some other person's fortune, by persuading him knowingly that false events are true or by the illegal concealment or by passing over in silence true ones, to some action, inaction or forbearance, is punished by imprisonment of at least three months and if the inflicted damage is particularly great by imprisonment of at least two years."

(1) 75 J.P. 311; [1911] 2 K.B. 82.

(2) 124 J.P. 316; [1960] 2 All E.R. 178; [1960] 2 Q.B. 498.

The English translation of the judgment of the Court of Piraeus reads as follows:

"At the Piraeus and at Rotterdam, Holland, in the months of January and February 1964 with the intention of obtaining for himself an unlawful pecuniary benefit caused damage to the property of another . . . Altex Katoenhandel N/T . . . by inducing the lawful representatives of the Rotterdam Head Office of the company by representing as true facts known by him to be false viz. . . . and thereafter the Rotterdam representatives of the company were induced and paid to the bank their agents the value of the cotton carried as having been loaded on the vessels namely 115,000 dollars . . . together with the sum of 90,000 drachmas for freightage which the accused received as maritime agent . . ."

Whether or not a person could be convicted of an offence against art. 386 of the Greek Penal Code without proof of all the ingredients of the offence of obtaining money by false pretences, in this case the finding of the Court of Piraeus shows that the court found that all the ingredients of that offence were established. They found that the appellant had obtained 90,000 drachmas from the company by false pretences and their statement as to the appellant's intent amounts to a finding that he acted with intent to defraud. In these circumstances I have no doubt that the crime of which he was convicted would, if it had been committed in England, have constituted the crime of obtaining money by false pretences, and, so, that his extradition was sought for the commission of an extradition crime.

Article 1 of the treaty only makes provision for the extradition of—

" . . . those persons who, being accused or convicted of any of the crimes or offences enumerated in art. 2, committed in the territory of the one party, shall be found within the territory of the other party."

Next counsel submitted that it had not been established that the crime of which the appellant had been convicted had been committed in Greek territory and so he could not be extradited. He had made a similar submission before the Divisional Court and in the course of his judgment LORD PARKER, C.J., said that this point had always given him concern. He came to the conclusion that what was stated in the judgment of the Court of Piraeus was—

" . . . quite consistent with the 90,000 drachmas having been received by the [appellant] in the Piraeus where he was domiciled and therefore with the crime having been committed in the Piraeus."

He consequently held that the magistrate was justified in holding that the crime was committed in Greece.

WINN, L.J., was of the opinion that there was nothing in the material before the court to show that any fact existed inconsistent with the complete crime having been committed within the territory of the Greek court, and WIDGERY, J., agreed on this with LORD PARKER, C.J.

I do not think that it is sufficient to say that the judgment of the Court of Piraeus was consistent or not inconsistent with the crime having been committed in Greece. It must appear that it was committed there.

In *Kossekechatko v. A.-G. for Trinidad* (1) the extradition of the appellants was sought on the ground that they were fugitive criminals from French Guiana who had been convicted in France of extradition crimes. One of the points taken on the appellants' behalf before the Privy Council was that it had not been proved that the crimes had been committed in France and reliance was placed on an affidavit by a French lawyer which stated that convictions for

(1) [1932] A.C. 78.

those crimes did not necessarily involve that they had been committed in France. Delivering the judgment of the Board, LORD RUSSELL OF KILLOWEN said:

"In their Lordships' opinion no one of the appellants was liable to be extradited under the treaty, unless the crime of which he was convicted was, in fact, committed within the territory of the French Republic. This being the case it next falls to be considered whether this essential fact was proved. It is admitted that no such proof was tendered in the case of any of the appellants. Nevertheless, it might have been unnecessary to do so, if it could have been shown that under French law no conviction in France of any of the appellants would have been possible unless the crime of which he had been convicted had, in fact, been committed in French territory. Any doubt which might have existed upon this point has been removed at the hearing before this Board; for the affidavit . . . makes it clear that, in the case of each appellant, his conviction in France did not necessarily involve that the crime of which he had been convicted had been committed in the territory of the French Republic.

"The omission to prove this essential fact (if it be the fact) is, in their Lordships' opinion, fatal . . ."

In this case there was no evidence that under Greek law the appellant might have been convicted in Greece if his crime had been committed outside Greek territory.

The finding of guilt in the judgment of the Court of Piraeus commences with the words "At the Piraeus and at Rotterdam, Holland" thereby indicating that the Greek court found that some part of the offence had been committed in Greece and a part in Holland.

In *R. v. Ellis* (1) it was held that the gist of the offence of obtaining money by false pretences lies in the act of obtaining and that if this act is done within the jurisdiction, it matters not that the false pretence was made abroad. In *R. v. Harden* (2) it was held that the obtaining was abroad as the accused had so acted as to make receipt by a postman in Jersey of a cheque posted by his victim the obtaining by him.

In this case the judgment of the Court of Piraeus shows that the appellant was domiciled at the Piraeus, that he was a maritime agent there, that he had issued three false bills of lading purporting to show that bales of cotton had been loaded on two vessels at Preveza when in fact the vessels were not in Greek waters, and that he had received 90,000 drachmas for freightage in his capacity as maritime agent. Although not expressly stated, it is in my opinion clear from the judgment that the court found that he had received this money in Greece. It is also to be inferred from the judgment that the court held that the issue of the false bills of lading had taken place in Greece.

They had, the judgment states, reached the company in Rotterdam by way of indorsement. The English translation of the judgment states that in consequence the representatives of the company at Rotterdam—

"were induced and paid to the Bank their agents the value of the cotton . . . together with the sum of 90,000 drachmas which the accused received as maritime agent."

The French translation which was required by the terms of the treaty and which the note verbale of 18th July said was the official translation, is somewhat different. It states that the representatives of the company in Rotterdam—

(1) 62 J.P. 838; [1899] 1 Q.B. 230.

(2) 126 J.P. 130; [1962] 1 All E.R. 286; [1963] 1 Q.B. 8.

"ont payé à la banque qui servait d'intermediare la valeur du coton porté . . . ainsi que la somme de 90,000 drachmas pour le nolis que l'accusé a encaissé comme agent maritime . . ."

It thus appears from the judgment of the Court of Piraeus that all that occurred at Rotterdam was the receipt of the false bills of lading and the payment there to a bank, either as agents of the company or as intermediaries, of the sums mentioned. If it were right to have regard to the English law and the equivalent English offence of obtaining money by false pretences to determine whether the Greek offence was committed in Greek territory, then, in my view, the answer would be that it was. There is no ground in this case for regarding receipt of the money by the bank as receipt by the appellant. The receipt of the 90,000 drachmas by the appellant in Greece would, therefore, be the obtaining.

What has to be considered is not the English equivalent offence but the Greek offence. The gist of that offence would appear to be harming some other person's fortune. If it is right to apply the test of where was the gist of the offence, harm was done to the company's fortune when it ceased to be possible for it to stop payment to the appellant of the 90,000 drachmas, that is to say, when he received or encashed that sum as maritime agent. He was a maritime agent at the Piraeus, and it is reasonable to infer that he received that sum there and so that the gist of the Greek offence was committed in Greece.

It was open to the appellant to adduce evidence, as was done in the *Kossekechatko* case (1) to show that he could have been convicted in Greece of the crime of which he was convicted if it had been committed outside Greece, and to show that under Greek law that crime was to be regarded, despite the reference to the Piraeus in the Greek court's finding, as having been committed outside Greece. No such evidence was produced at any time, nor was any effort made to produce it. In the circumstances there was, in my opinion, evidence before the magistrate on which he could properly conclude on the materials before him, and whether or not the test of the gist of the offence is applicable, that the crime was committed in Greece. This contention of counsel for the appellant in my opinion, also fails.

Counsel for the appellant's final contention was that the appellant's conviction was a conviction of contumacy. It followed, he contended, that the appellant should have been dealt with as an accused person. He was not so dealt with and no evidence such as is required for the extradition of an accused person was produced before the magistrate. Therefore, he contended the appeal should be allowed.

Section 26 of the Extradition Act 1870 states, *inter alia*, that:

"The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy."

Article 8 of the treaty provides, *inter alia*, that:

"A sentence passed in contumaciam is not to be deemed a conviction, but a person so sentenced may be dealt with as an accused person."

It is curious that the treaty should speak of a sentence passed in contumaciam not being deemed a conviction, for a sentence follows on conviction. This misuse of language is, in my opinion, of no importance for it is to be assumed that a sentence passed in contumaciam followed on a conviction in contumaciam. On this view of art. 8 there is no material difference between the article and the definition in s. 26 of the Act.

(1) [1932] A.C. 78.

A conviction for contumacy is unknown under our law. It is not apparent from the Act of 1870 why a person so convicted under foreign law was required to be dealt with as an accused person. Light is, however, thrown on this by the decision in *Re Coppin* (1) where the prisoner whose extradition was sought had been condemned *par contumace* in France. Evidence was given by a French advocate that a judgment *par contumace* is annulled if the person to whom it relates is arrested or surrenders himself

"so that it is exactly the same as if no proceedings had been taken against him, and then he undergoes his trial for the offence with which he was charged."

LORD CHELMSFORD, L.C., said that in these circumstances he did not see how the prisoner could be described otherwise than as an accused person.

If the fact be that, on his arrest or surrender, the accused person will be put on trial as if he had never been convicted in his absence, it is clearly right that he should be dealt with in this country not as a convicted but as an accused person. The definition in s. 26 secures this.

In *Re Caborn-Waterfield* (2) it was said that the words "conviction for contumacy" in s. 26 were a translation of the French words "*par contumace*" and did not include a final "*jugement itératif défaut*" as, on a conviction on a judgment *itératif défaut*, the accused would not be tried on his surrender but would begin serving his sentence without further trial.

In this case evidence was given before the magistrate by a member of the Bar in Athens. He said that, if the appellant was returned to Greece, he would go to prison under the judgment of the Court of Piraeus to serve his sentence, that the judgment was final as it was going to be executed immediately, and that an appeal against the sentence would have no suspensive effect.

Unfortunately, he was not asked whether under the law of Greece there was such a thing as a conviction for contumacy. As the appellant's extradition would not be permissible if under the law of Greece the conviction was for contumacy, their Lordships thought it right to ask to be supplied with a statement agreed by the counsel for the parties as to the Greek law with regard to this. Their Lordships are obliged to counsel for complying with this request. The statement supplied contains the following passages:

"There is no term of art in Greek criminal proceedings referring to 'contumace' or 'in contumacy' or any other word derived from the Latin '*contumacia*' . . ."

It may, perhaps, be the case that in 1910 when the treaty was made there was. The statement continues:

"There is no criminal procedure under Greek law whereby a person convicted of a crime in his absence, after 15 days from that conviction if apprehended, still has the status of an accused person who remains to be tried for that offence . . ."

The member of the Athens Bar who gave evidence said that under art. 341 of the Greek Code of Criminal Procedure a person convicted in his absence can within 15 days ask for a rehearing if his absence was caused by genuine reasons beyond his control whereby he could not have made an application for an adjournment previously. The existence of a right in certain circumstances to a rehearing does not mean that a person convicted in his absence will on

(1) (1866), 30 J.P. 776; 2 Ch. App. 47.

(2) 124 J.P. 316; [1960] 2 All E.R. 178; [1960] 2 Q.B. 498.

arrest or surrender be treated as an accused person. In the light of this statement and of the evidence given by the member of the Athens Bar before the magistrate, it is, in my opinion, clear beyond doubt that the conviction of the appellant in Greece was not a conviction for contumacy, that the sentence passed on him was not a sentence in contumacia, and that he was properly treated before the magistrate as a convicted and not as an accused person.

My conclusion is not affected by the fact that in the French official translation of the Greek judgment, the following appears:

“PAR CES MOTIFS

Statuant par contumace de l'accusé . . .

Le declare coupable de ce que . . .”

The English translation reads as follows:

“NOW THEREFORE

Deciding upon the non-appearance of the accused . . .

Find him guilty of . . .”

It was not disputed that the English translation was correct. I have, in the course of this opinion, drawn attention to other misinterpretations. I trust that great care will be taken to avoid them in these cases in future.

For the reasons I have given, in my opinion this appeal should be dismissed.

LORD MACDERMOTT: My Lords, I concur, and have nothing to add.

LORD MORRIS OF BORTH-Y-GEST: My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend on the Woolsack, and I concur in dismissing the appeal.

LORD GUEST: My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend on the Woolsack. I have nothing to add. I agree that the appeal should be dismissed.

LORD UPJOHN: My Lords, I concur.

Appeal dismissed.

Solicitors: *Freeman & Co.; Rennett & Rigden; Treasury Solicitor.*

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(MEGAW, L.J., MELFORD STEVENSON AND JAMES, JJ.)

June 12, 13, 1969

R. v. BERKELEY

Criminal Law—Trial—Jury—Failure to inform defendant of right of challenge—Defendant represented by counsel and solicitor present in court—No challenge of juror—Conviction—No prejudice to defendant—No miscarriage of justice.

On the trial of the appellant, before the jury were called into the box to be sworn, he was not informed of his right of challenge. The appellant was represented by counsel and solicitor, who were present in court at the time and took no objection, and no challenge of any juror took place. On appeal against conviction,

HELD: distinguishing cases where a defendant had been denied his right of challenge, there had been no prejudice to the appellant nor any miscarriage of justice, and the conviction must be affirmed.

APPEAL by David James Berkeley against his conviction and sentence at Manchester Crown Court of living on the earnings of prostitution and indecent assault, when he was sentenced to five years' and 12 months' imprisonment concurrent.

S. C. Desch for the appellant.

The Crown did not appear and were not represented.

MEGAW, L.J., delivered this judgment of the court: The court is most grateful to counsel for the appellant for the very clear and succinct manner in which he has put forward submissions on behalf of the appellant in this matter. I should briefly recapitulate what is the matter with which we are at the moment concerned. We dealt yesterday with all the grounds of application put forward by the appellant himself, and expressed a clear conclusion that there is nothing in those grounds which begins to warrant the granting of leave to appeal against either conviction or sentence.

We did, however, refer to the matter which the court had noticed, not referred to in the appellant's grounds. The jurors waiting for this trial were sent out of court after the arraignment and pleas had been taken in order that certain matters might be discussed, which counsel desired should be discussed in the absence of potential jurors. The jurors were then brought back into court and they were sworn, and it appears that nothing was said to the appellant as to his right to challenge people who were called to serve on the jury when they came to the book to be sworn.

There is no authority which is directly in point: there is no case to which counsel can refer us, or which we have been able to discover, in which this particular position arose. There are cases where it has been made clear that if an accused is refused the right to challenge when he seeks to exercise it then the conviction should be quashed and a venire de novo may be ordered. Counsel's submission is that this instance of failure to inform the appellant of his right should be treated as producing the same consequences, and that it is not necessary for the accused in such circumstances to be able to show that he would, in fact, have exercised that right, or that the failure to exercise that right has prejudiced him in any way. This court does not accept that proposition. It is to be observed that in this case at the time when the jury were sworn the appellant was represented by counsel and solicitor, and they were present in court. No point was raised, no objection was taken. The appellant in his grounds of application has not referred to the matter at all. This is not a case of a denial

to an accused of his right to challenge, it is merely a failure to follow what has been certainly a very long-continued practice of informing an accused of the existence of that right.

In the view of this court, it would be quite wrong, certainly in the circumstances of this case, having regard to the presence of counsel and solicitor and to the contents of the grounds of application, to speculate on the question whether there might have been some different course taken if notice had been given to him of the existence of a right of challenge. This court is satisfied that it would be wrong to say that there was prejudice to the appellant or that there has been any miscarriage of justice as a result of this irregularity, if irregularity it be. In the circumstances, it follows from what has been said this morning and yesterday that the application for leave to appeal against conviction and sentence is refused and, insofar as the matter with which we have dealt this morning is to be treated as a matter of law and, therefore, an appeal without the necessity of leave, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(PHILLIMORE, L.J., MELFORD STEVENSON AND JAMES, JJ.)

June 20, 1969

R. v. BARRETT

Criminal Law—Sentence—Extended term of imprisonment—Inclusion of period of suspended sentence—Criminal Justice Act, 1967, s. 37 (2).

The period of a suspended sentence cannot become an extended term of imprisonment under s. 37 of the Criminal Justice Act, 1967.

Where, therefore, the appellant had in September, 1968, received a suspended sentence of 18 months' imprisonment, and in February, 1969, was sentenced to three years' imprisonment for further offences, and the court ordered that the suspended sentence should take effect consecutively to that term, and certified that the total of 4½ years was to be an extended term of imprisonment under s. 37 of the Criminal Justice Act, 1967,

HELD: the extended term of imprisonment should have been applied to the sentence of three years only, and not to the eighteen months' suspended sentence.

APPEAL by Ronald Bryan Barrett against sentences of 12 months' and three years' imprisonment concurrent imposed at Hampshire Quarter Sessions on 10th February 1969 and a suspended sentence of 18 months, imposed on 23rd September 1968, which was then ordered to take effect and to be consecutive to the three years.

F. R. N. H. Massey for the appellant.

PHILLIMORE, L.J., gave the judgment of the court. This appellant appeared on 10th February 1969 at Hampshire Quarter Sessions and pleaded guilty to housebreaking and larceny of £27 in cash and to a second count of store-breaking and larceny of property worth £80 and asked for 11 other offences to be taken into consideration. Those offences involved property of a little over £660 in value. He was sentenced to 12 months' imprisonment on the first count and to three years' imprisonment on the second count and the 11 other offences were taken into consideration. Those two sentences, 12 months and three years,

were made concurrent and the court then proceeded to deal with another matter on which he had received a suspended sentence. That had been imposed on 23rd September 1968 at Derby Borough Sessions. He had been convicted of officebreaking and larceny and sentenced to 18 months' imprisonment suspended for two years and at Hampshire Quarter Sessions it was ordered that that suspended sentence should take effect and should be consecutive to the three years, making a total of $4\frac{1}{2}$ years, and the court then certified that the total sentence of $4\frac{1}{2}$ years was to be an extended term of imprisonment under s. 37 of the Criminal Justice Act 1967.

He now appeals against that sentence by leave of the single judge. Counsel on his behalf really takes two points. He says first of all that the certificate that this was to be an extended sentence ought not to have been applied to the whole of the $4\frac{1}{2}$ years but only to the three years for the two offences on which he was immediately appearing before the court, and secondly he says that to impose the suspended sentence was too harsh in all the circumstances of this case.

Dealing with these two points, this court thinks that Hampshire Quarter Sessions were wrong in saying that the whole $4\frac{1}{2}$ years must be treated as an extended sentence. It seems to this court that the matter was put correctly in the case of *R. v. Ithell* (1), which is conveniently summarised in para. 741A of the 9th CUMULATIVE SUPPLEMENT to ARCHBOLD CRIMINAL PLEADING EVIDENCE & PRACTICE (36th Edn.) in the following terms:

"The court should first sentence the offender in respect of the fresh offence [or of course here "offences"] and thereafter address itself to the question of the suspended sentence. Unless there are quite exceptional circumstances, the suspended sentence should be ordered to run *consecutively* to the sentence for the fresh offence."

Here, therefore, what the court should have done was to determine the sentences that it intended to impose for the two offences charged before it, and then, if it thought right (and in this case nobody could quarrel with the decision) order that the resulting sentence, in this case three years, should be an extended sentence and then go on to consider the suspended sentence and decide, as it did here, whether it should be put into effect and should run consecutively. After all, if a court orders that a suspended sentence should become an extended sentence, it is altering the whole quality of the sentence as originally imposed and that is clearly contrary to principle. The practical result is rather minimal in the light of the words of s. 104 (2) of the Criminal Justice Act 1967, which provides that:

"For the purposes of any reference in this Act, however expressed, to the term of imprisonment or other detention to which a person has been sentenced or which, or part of which, he has served, consecutive terms and terms which are wholly or partly concurrent shall be treated as a single term."

Nevertheless we think that this matter should be corrected and accordingly we propose to return the certificate dated 10th February 1969, to the quarter sessions to have it corrected so as to make clear that the extended sentence applies only to the periods of 12 months and three years concurrent.

Turning to the second point, counsel says that this act of imposing the suspended sentence so that it ran consecutively resulted in a sentence which was altogether too harsh. This court has of course considered that with care but it is quite unable to accept that contention. This appellant, who is 33, has a very

bad record and he has got a bad probation report. His principal point appears to be that he has recently formed an association with a woman who has three children and that she has a very bad heart condition so that she is unlikely to live for more than two years. There is no medical evidence before us to substantiate this and none was produced to the quarter sessions. He is clearly a man who forms associations with the other sex somewhat readily and indeed until comparatively recently he had an entirely different woman friend.

The court does not think that this sentence totalling 4½ years was in any way excessive in all the circumstances. Accordingly the appeal will be allowed to the extent that the extended sentence should have been imposed only in regard to the three years and the certificate, as already stated, will be returned to quarter sessions for the appropriate correction.

Appeal allowed in part.

Solicitors: *Registrar of Criminal Appeals.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WINN, L.J. AND EVELEIGH, J.)

June 20, 1969

R. v. BROWN

Criminal Law—Handling stolen goods—Dishonestly assisting in retention—Failure to reveal to police presence of goods on defendant's premises—Theft Act, 1968, s. 22 (1).

A mere failure on the part of the defendant to reveal to a police officer who has visited and searched his premises the presence of stolen goods therein does not amount to assisting in the retention of stolen goods within the meaning of s. 22 (1) of the Theft Act, 1968, nor is the position affected by the fact that the defendant, when told that he would be arrested, said to the arresting officer: "Get lost".

APPEAL by Michael Thomas Ernest Brown against his conviction at Dorset Quarter Sessions of handling stolen goods by dishonestly assisting in their retention, contrary to s. 22 (1) of the Theft Act, 1968, when he was placed on probation for two years.

Florence O'Donoghue for the appellant.

D. P. O'Brien for the Crown.

LORD PARKER, C.J., delivered this judgment of the court: On 19th February 1969 at Dorset Quarter Sessions the appellant was convicted of handling stolen goods contrary to s. 22 (1) of the Theft Act 1968. He was sentenced only to undergo a period of two years' probation. He appeals to this court on a point of law as to the meaning of this subsection in the new Act.

The short facts were that on a night in January 1969 a café at Weymouth was broken into and a quantity of cigarettes and foodstuff was stolen. The next morning, which was 20th January, police went to the flat of which the appellant was the tenant and found him in bed, and in that flat they found a quantity of the stolen goods. He was asked if he knew anything about this theft, and he said he did not know anything about it. He did not impede a search and there was found some of the stolen goods, namely ham, bacon and other perishable foodstuffs in a refrigerator. The police in fact did not find, at any rate, any

quantity of the cigarettes which had been stolen. When the appellant was arrested, he said to the officer: "Get lost", and he was thereupon taken to the police station. It was only later that the cigarettes were found. They had been taken out of their packets, put into a plastic bag and were in fact at the foot of the wardrobe in which some of the appellant's clothes were hanging.

A man called Holden was called by the prosecution. Holden gave evidence that he and others had broken into the café and had stolen the goods, and that he had brought them to the appellant's flat, where, incidentally, other people were sleeping, and had hidden them there, and he described how he had taken the cigarettes out of the packets, put them in the plastic bag and hidden them in the wardrobe. Holden went on to say that later and before the police arrived he told the appellant where the cigarettes were; in other words he said that the appellant well knew that the cigarettes were there and that they had been stolen. Holden was an accomplice, but there was evidence capable of amounting to corroboration in the form of a conversation which was overheard by Detective Constable Carver while these men were in the cells. According to the detective constable the appellant said to Holden: "Did you tell them where the fags are?" plainly indicating that he knew about them. Holden said: "Yes." The appellant: "What did you do that for?" Holden: "I had to. You will be all right. You have got nothing to worry about." The appellant: "You say I was asleep."

The point of law arises on a direction given by the chairman in regard to this handling of stolen goods. In fact the appellant had been charged on three counts; the first was the breaking in. The prosecution did not pursue that and the jury at the direction of the chairman acquitted him. The second and third counts both alleged offences of handling the goods, but they were divided into two parts, count 2 relating to a handling by way of receiving, getting the goods into his possession or control, and on that likewise he was acquitted. But the third count alleged a handling of goods by dishonestly assisting in the retention of the stolen goods. It is in regard to the direction on that count on which he was convicted that this appeal arises.

This conviction must clearly have been on the basis that the jury were satisfied that at some stage before the police arrived the appellant knew that these cigarettes had been stolen, and indeed that the rest of the property had been stolen. It was on the assumption that the jury were so satisfied that the chairman gave this direction:

"So far as the other count of dishonestly assisting in the retention of the goods is concerned, it appears to me that the matter for you to consider is whether, assuming that you are satisfied that [the appellant] knew that these stolen cigarettes were in the wardrobe when Detective Constable Chatterley came, he was dishonestly assisting in their retention by not telling the constable that they were there."

He goes on to embroider that:

"Remember that when Constable Chatterley went there, having found the perishable goods but not the cigarettes, he went and spoke to the [appellant] whose reply merely was, 'Get lost!' The [appellant] was thereupon arrested. Well, instead of saying, 'Get lost!', it would have been open to the [appellant], assuming that he knew all about it, to have said to the constable, 'You will find that the rest of the goods, which are cigarettes, are hidden behind the drawer in that wardrobe there.'"

Then the chairman said much the same:

"The matters to which you ought to apply your minds are the hiding of the cigarettes behind the drawer of the wardrobe and assisting in their retention, if you think he did, by not telling Detective Constable Chatterley that the cigarettes were there."

Finally, just before the jury retired the chairman said:

"Well, members of the jury, it may well be that if [the appellant] had kept his mouth completely shut it might on that be possible to say he was not guilty, but he did not keep his mouth completely shut, he told the police constable to get lost, and it is for you, members of the jury, to consider whether in saying 'Get lost' instead of helping the police constable he was dishonestly assisting in the retention of stolen goods."

It is urged here that the mere failure to reveal the presence of the cigarettes, with or without the addition of the spoken words "Get lost", was incapable in itself of amounting to an assisting in the retention of the goods within the meaning of the subsection. The court has come to the conclusion that that is right. It does not seem to this court that the mere failure to tell the police, coupled if you like with the words "Get lost", amounts in itself to an assisting in their retention. On the other hand, those matters did afford strong evidence of what was the real basis of the charge here, namely that knowing that they had been stolen he permitted them to remain there or, as it has been put, provided accommodation for these stolen goods in order to assist Holden to retain them. To that extent, it seems to this court, this direction was incomplete. The chairman should have gone on to say: "But the fact that he did not tell the constable that they were there and said 'Get lost' is evidence from which you can infer if you think right that this [appellant] was permitting the goods to remain in his flat, and to that extent assisting in their retention by Holden."

It may be thought to be a matter of words, but in the opinion of this court some further direction was needed. On the other hand it is a plain case in which the proviso should be applied. It seems to this court that the only possible inference in these circumstances, once Holden was believed, is that the appellant was assisting in their retention by housing the goods and providing accommodation for them, by permitting them to remain there. In those circumstances the court is satisfied that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: Registrar of Criminal Appeals; Sharpe, Pritchard & Co., for J. R. Pryer, Dorchester.

T.R.F.B.

QUEEN'S BENCH DIVISION

(FISHER, J.)

May 13, 14, 15, June 3, 1969

MINISTRY OF HOUSING AND LOCAL GOVERNMENT *v.* SHARP AND ANOTHER

Town and Country Planning—Negligence—Breach of statutory duty—Compensation notice—Negligent search—False certificate issued by Council employee—Liability of registrar of local land charges register and local authority—Town and Country Planning Act 1954 (2 & 3 Eliz. 2 c. 72), s. 28 (5)—Land Charges Act 1925 (15 & 16 Geo. 5 c. 22), s. 17 (3)—Local Land Charges Rules 1934 (S.R. & O. 1934 No. 285), r. 15—Local Land Charges (Amendment) Rules 1954 (S.I. 1954 No. 1677) r. 2.

In 1960 N. was refused permission to develop certain land and was paid compensation in accordance with the Town and Country Planning Acts. The Ministry of Housing and Local Government served a compensation notice relating thereto which was duly registered in the local land charges register kept by the rural district council. Two years later N. was granted permission to develop the land, and in accordance with the Acts the compensation had to be repaid to the Minister before the development could take place. Purchasers of the land sent a requisition to the council for an official search in the register. An employee of the council carried out the search negligently and failed to record the compensation notice. The purchasers completed the purchase without knowledge of the notice. The Minister initially sought to recover the amount of the compensation from the purchasers, but subsequently he conceded that they were not liable to repay it. He made this concession because of s. 17 (3) of the Land Charges Act 1925, which provided that a certificate issued by a registrar was to be conclusive "in favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries [were] registered or allowed [by the Land Charges Act to be made in the register]". Section 28 (5) of the Town and Country Planning Act 1954 provided for rules to be made under s. 15 (6) of the Land Charges Act 1925 as to the manner in which compensation notices were to be registered in the register of local land charges. In purported pursuance of this power the Local Land Charges (Amendment) Rules 1954 provided that r. 15 (1) of the Local Land Charges Rules 1934 was to apply to compensation notices under the Act of 1954. That rule applied s. 17 (3) of the Land Charges Act 1925. The Minister claimed the amount of the compensation on the ground of breach of statutory duty from the first defendant who was the clerk of the council and as registrar was under a duty to keep the register, and also from the council who were second defendants on the grounds of negligence and breach of statutory duty.

HELD: (i) section 17 (2) of the Land Charges Act 1925 imposed on the registrar a duty to include in the certificate all entries which actually subsisted on the register, and since this was not done he was in breach of that statutory duty;

(ii) the employee who searched the register was under a duty of care towards the Minister and he was in breach of it by giving a clear certificate omitting the compensation notice and the second defendants were vicariously liable for his negligence;

(iii) the action, however, failed as the Minister had wrongly assumed that the certificate was conclusive whereas it was not since the rules of 1954 were (a) *ultra vires* insofar as they purported to apply to compensation notices the provision of r. 15 of the Local Land Charges Rules 1934 which incorporated s. 17 (3) of the Land Charges Act 1925, or (b) ineffective to do since r. 15 was itself ineffective to make certificates conclusive in respect of anything except "matters or documents whereof entries [were] required or allowed" to be made in the registry by the Land Charges Act 1925, and entries of compensation notices were not required or allowed by that Act.

ACTION in which the Ministry of Housing and Local Government sued W. A. F. Sharp and Hemel Hempstead Rural District Council for damages for negligence and breach of statutory duty.

J. P. Warner and Gordon Slyn for the Ministry.

D. S. Hunter for the defendants.

Cur. adv. vult.

3rd June. **FISHER, J.**, read the following judgment: When the certificate of a search in a local land charges registry omits a charge which is clearly entered in the register, and a person interested in the charge suffers damage as a result of the omission, is the registrar liable in a civil action for breach of statutory duty? I have decided that he is. If the clerk who made the search was negligent in omitting the charge, and a person interested in the charge suffers damage as a result of his negligence, are his employers liable for damages for negligence? I have decided that they are. But on the wording of the statutes involved in the present case I have decided that the plaintiff did not suffer damage by reason of the negligence or of the breach of statutory duty, and therefore the action fails.

Mr. Sharp, the first defendant, is the clerk to the Hemel Hempstead Rural District Council, the second defendants. He has the duty, imposed on him by statute, of keeping the register of local land charges. Originally local land charges were charges in favour of a local authority, but later statutes have provided that other matters should be land charges or should be dealt with as if they were land charges, or simply that they should be registered in the local land charges register. Among these other matters are what are called planning charges. These consist in the main of prohibitions of or restrictions on the user or mode of user of land or buildings which take effect by virtue of the Town and Country Planning Act 1947 or previous planning Acts, but they include also charges secured by notice required to be registered under the Town and Country Planning Act 1954.

These charges arise in this way. Under the Act of 1947 development charges were to be paid when land was developed, and the Act provided for a £300 million fund out of which compensation was to be paid in respect of depreciation of land values by reason of the provisions of the Act to persons who established claims for payments. The Acts of 1953 and 1954 did away both with development charges and with the £300 million fund but the Act of 1954 provided that when permission to develop land in respect of which a claim had been established under the Act of 1947 was refused compensation should be payable. If, however, permission was subsequently granted, then the compensation had to be paid back to the Minister of Housing and Local Government before the development could take place.

In 1960 a Mr. H. A. Neale, who had an established claim in respect of 1.3 acres of land opposite Arbor, Chipperfield Road, Kings Langley, applied for permission to develop that land, which lies in the Hemel Hempstead rural district, and permission was refused. He thereupon applied to the Minister for compensation in the sum of £1,828 11s. 5d., and this sum was paid to him by the Minister. The Minister then, as required by the Act, served on the second defendants a compensation notice recording these facts, and the notice was duly registered in the local land charges register.

Two years later, in 1962, Mr. Neale again applied for permission to develop the land and this time it was granted. He was going to sell the land to a company, J. & A. Parsons (Builders), Ltd., who were going to carry out residential development consisting of the construction of houses thereon. On 1st November 1962, solicitors acting for Parsons sent to the second defendants a requisition for an official search in the register of local land charges. They identified the land by a plan. The search was carried out by a full-time employee of the second defendant (whom I shall call the searcher) acting in the course of his employment. He, unfortunately, as is conceded by counsel for both defendants, carried out the search carelessly. The index for the register is in the form of a

plan with the numbers of the relevant pages in the register overprinted on the relevant pieces of land on the plan. There is no doubt that the searcher looked in the index and found the right piece of land, because in the certificate of search he entered the grant of planning permission with the appropriate reference number; but he omitted to record the compensation notice, although it was clearly marked and entered in the register, and also on the plan attached to it. The page on which it was entered was one of those whose numbers were overprinted in the index plan for this piece of land. The certificate was signed by the first defendant, but it is accepted by the Minister that no blame for the mistake can be attached to him personally. Accordingly Parsons, the intending purchasers, received a certificate which so far as this compensation notice was concerned was a clear certificate.

Application was made to Parsons for repayment of the compensation, but they refused to repay it, relying on the clear certificate which they had received. Eventually the Minister conceded that they could not be required to pay, and by letter dated 27th September 1963 so informed them.

Section 17 (3) of the Land Charges Act 1925 provides as follows:

"In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents whereof entries are required or allowed as aforesaid, the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be."

One of the issues in this action is whether that section applies to compensation notices.

The ministry's claim in this action is set out in para. 8 to para. 10 of the statement of claim:

"8. But for the issue of the clear certificate Parsons would have been liable, as a condition of carrying out the said development to repay to the Minister the amount of the compensation referred to in the compensation notice pursuant to the provisions of sections 113 and 114 of the Town and Country Planning Act, 1962.

"9. Pursuant to the provisions of section 17 (3) of the Land Charges Act 1925 as applied by the Local Land Charges Rules 1934 the clear certificate relieved Parsons of the obligation to make any repayment of compensation to the Minister and the Minister thereby lost the right to recover the said sum of £1,828 11s. 5d. or any part thereof.

"10. The Minister's said loss was occasioned by the breach of statutory duty and/or negligence of the first defendant and/or of the second defendants, their servants or agents."

Counsel for the ministry has made it clear that against the first defendant he alleges only breach of statutory duty and that the allegation of negligence is made only against the searcher, such negligence being (so the ministry says) negligence for which the second defendants are vicariously liable. If s. 17 (3) does not apply and the Minister could, despite the clear certificate, have required Parsons to repay the compensation, then the claim fails, since the Crown has suffered no damage as a result of the incorrect certificate. It is true that the Crown probably cannot now recover the money from Parsons, but that is because of the concession (on this basis a wrong concession) contained in the letter of 27th September 1963. If, on the other hand, s. 17 (3) does apply, then the following issues arise: (i) was the first defendant in breach of a duty imposed on him by statute? (ii) if so, was it a breach in respect of which a civil claim

for damages will lie? (iii) was there a duty resting on the searcher towards the persons interested to take care in making the search and making out the certificate, so that an action for damages will lie against him or against his employers if he negligently and in breach of the duty omits from the certificate an entry which is in the register?

The discussion of the law which follows and the conclusions which I reach are, of course, in relation to the situation as at the relevant dates in 1962 and 1963: I am not concerned with any later alterations in the law.

The Land Charges Act 1925 is one of the set of property statutes which came into force on 1st January 1926. They were consolidating Acts, setting out the law as contained in a large number of previous property statutes as amended by the reforming legislation of 1922. The precursors of the Land Charges Act 1925 (or that part of it with which I am concerned) were the Conveyancing Act 1882 and the Land Charges Registration and Searches Act 1888. Section 2 (1), (2) and (3) of the Act of 1882 and s. 10, s. 12, s. 16 and s. 17 of the Act of 1888 are relevant, and it is important to note that in s. 2 (2) of the Act of 1882, which corresponded with s. 17 (2) of the Land Charges Act 1925, the words were—

“Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof . . .”.

Local land registries were first provided for by the Law of Property Act 1922, Sch. 7, para. 2. The Land Charges Act 1925 now embodies the system whereby it is only by registration that a charge which is capable of registration can be made binding on a purchaser of land. In relation to such charges the system takes the place of the old law about actual and constructive notice. By s. 198 of the Law of Property Act 1925 registration under the Land Charges Act 1925 constitutes actual notice, and the combined effect of s. 13 of the Land Charges Act 1925 and s. 199 of the Law of Property Act 1925 is that a purchaser is not affected by an unregistered charge even if he has actual notice of it.

The present case is concerned with local land charges (which are dealt with in Part 6 of the Land Charges Act 1925); but I must read some of the earlier part of the Act, for two reasons: firstly, local land charges are by s. 15 (2) assimilated to Class B land charges; secondly, because by s. 15 (3) it is provided that the proper officer of the local authority shall have the powers and be subject to the same obligations as the registrar (that is to say, the land registrar) has or is subject to in relation to a land charge. By s. 20 (10), “‘Registrar’ means the Chief Land Registrar; ‘registry’ means [Her] Majesty’s Land Registry”. Section 1 of the Act provides that the registrar shall keep registers, including (e) a register of land charges. Parts 1 and 4 deal with the registration of pending actions, annuities, writs and orders affecting land, and deeds of arrangement. Part 5 starts with s. 10, which states the various classes of land charge. The definition of Class B land charges is relevant, as is the definition of “Purchaser” in s. 20 (8). Part 6 deals with local land charges; as amended by the Law of Property (Amendment) Act 1926 and the Town and Country Planning Act 1947, s. 15 (1) and (7) provides as follows:

“(1) Any charge (hereinafter called ‘a local land charge’) acquired either before or after the commencement of this Act by the council of any administrative county, metropolitan borough, or urban or rural district, or by the corporation of any municipal borough, or by any other local authority under the Public Health Acts, 1875 to 1907, the Metropolis Management Acts, 1855 to 1893, or the Private Street Works Act, 1892, or

under any similar statute (public general or local or private) passed or hereafter to be passed, which takes effect by virtue of the statute, shall be registered in the prescribed manner by the proper officer of the local authority, and shall (except as hereinafter mentioned in regard to charges created or arising before the commencement of this Act) be void as against a purchaser for money or money's worth of a legal estate in the land affected thereby, unless registered in the appropriate register before the completion of the purchase . . . (7) The foregoing provisions of this section shall apply to— . . . (b) any prohibition of or restriction on the user or mode of user of land or buildings imposed by a local authority after the commencement of this Act by order, instrument, or resolution, or enforceable by a local authority under any covenant or agreement made with them after the commencement of this Act, or by virtue of any conditions attached to a consent, approval, or licence granted by a local authority after that date, being a prohibition or restriction binding on successive owners of the land or buildings, and not being—(i) a prohibition or restriction operating over the whole of the district of the authority or over the whole of any contributory place thereof; or . . . (iii) a prohibition or restriction imposed by a covenant or agreement made between a lessor and lessee; as if the . . . resolution, authority, prohibition, or restriction were a local land charge, and the same shall be registered by the proper officer as a local land charge accordingly."

Part 7 deals with searches. Section 16 applies to any register, but s. 17 applies only to searches at Her Majesty's Land Registry. Section 16 provides: "Any person may search in any register or index kept in pursuance of this Act on paying the prescribed fee", and s. 17 (I read only sub-s. (1) and sub-s. (2), but the whole section is relevant), provides:

"(1) Where any person requires search to be made at the registry for entries of any matters or documents, whereof entries are required or allowed to be made in the registry by this Act, he may on payment of the prescribed fee lodge at the registry a requisition in that behalf. (2) The registrar shall thereupon make the search required, and shall issue a certificate setting forth the result thereof."

Subsection (3) I have read. Subsection (4) provides for the form of the requisition. Subsection (5) imposes criminal sanctions on any officer, clerk or person employed in the registry who

" . . . commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate under this section . . ."

That s. 17, as I have said, applies only to searches at Her Majesty's Land Registry. Turning to s. 15 (6), one finds a rule making power which provides:

"Separate rules may be made under this Act in reference to local land charges for giving effect to the provisions of this section and in particular— (a) for prescribing the mode of registration of a general or specific charge [whether by reference to the estate owner or to the land affected or otherwise]; . . . (c) for prescribing the proper officer to act as local registrar, and making provision as to official certificates of search to be given by him in reference to subsisting entries in his register; (d) for determining the effect of an official certificate of search in regard to the protection of a purchaser, solicitor, trustee or other person in a fiduciary position, and for prescribing the fees to be paid for any such certificate or for a search; . . ."

It will be seen that power is given to make rules as to the matters dealt with in s. 17 (1) to (3) and (7) to (9), but not with the matters dealt with in s. 17 (4) to (6). No criminal sanction can therefore be imposed on a local registrar or on any officer, clerk or person employed in a local registry for fraud, collusion or wilful negligence in relation to a certificate. Section 25 of the Act provides that the Act binds the Crown.

It is relevant at this stage to refer to the Land Registration Act 1925. This Act deals with registration of title to land. Under that Act it is again the Chief Land Registrar who has to register, and the registry is Her Majesty's Land Registry. By s. 131 no civil action may be taken against the Chief Land Registrar or his officials for anything done in good faith in the exercise or supposed exercise of the powers of the Act; and by s. 83 (2) a right of indemnity out of the insurance fund referred to in s. 85 is given to any person suffering loss by reason of an error or omission in the register.

Before I turn to the Local Land Charges Rules 1934 it will be convenient to refer to the relevant provisions of the Town and Country Planning Act 1954. The right to compensation in respect of planning decisions is dealt with in s. 16 to s. 22, which I need not read, and s. 27 deals with determination of claims.

Section 28 (4) and (5) provide as follows:

"(4) Where, on a claim for compensation under this Part of this Act in respect of a planning decision, compensation has become payable of an amount exceeding twenty pounds, the Minister shall cause notice of that fact, specifying the planning decision and the land to which the claim for compensation relates, and the amount of the compensation and any apportionment thereof under this section, to be deposited with the council of the county borough or county district in which the land is situated and, if that council is not the local planning authority, with the local planning authority.

"(5) Notices deposited under this section shall be registered in the register of local land charges, in such manner as may be prescribed by rules made for the purposes of this section under subsection (6) of section fifteen of the Land Charges Act, 1925, by the proper officer of the council of the county borough or county district."

Then s. 29 (1) provides:

"No person shall carry out any new development to which this section applies, on land in respect of which a notice (in this section referred to as a 'compensation notice') is registered under the last preceding section, until such amount (if any) as is recoverable under this section in respect of the compensation specified in the notice has been paid or secured to the satisfaction of the Minister."

It is conceded that the proposed development on the land the subject of this action was new development, to which the section applies. Then later in the section there is provision for recovery by the Minister of the amount if any person initiates any new development to which this section applies in contravention of sub-s. (1) of the section.

The Town and Country Planning Act 1954 was replaced by the Town and Country Planning Act 1962, but no alteration was made in the provisions quoted above. It is a question of some uncertainty but no importance which of the two Acts applies to the notice in the present case.

I turn now to the Local Land Charges Rules 1934, which are conveniently set out as amended up to 1960 in PROFESSOR GARNER's book on LOCAL LAND CHARGES (4th Edn.) at p. 133. The relevant provisions are the definition of

planning charges in r. 2; r. 4 (1) (i), which provides that the proper officer, so far as concerns the compensation notice in the present case, is to be the clerk of the borough or district council in whose district the land affected by the charge is situate; r. 5, the opening words, and para. (c), which provides that planning charges, which by definition include charges secured by notices required to be registered under the Act of 1954, are to be registered in Part 3 of the register; r. 9c, which gives the details which are to be included in the register; and r. 15, which is important. It is headed (at p. 148) "Searches and Official Certificates of Searches", and it provides, in sub-para. (1):

"The provisions of sub-sections (1), (2), (3), (7), (8) and (9) of section 17 of the Land Charges Act (which relate to official certificates of search and to the effect of such certificates) shall apply to the registrars and registries of local land charges."

Then r. 15 (2) sets out the manner in which a requisition for search is to be made, and r. 15 (4) provides:

"Requisitions for search and official certificates of search shall be in the form set out in the First Schedule hereto, or in such other form as the Minister may from time to time determine."

I need not further refer to the facts and documents in the case, since para. 1 to para. 7 of the statement of claim are, subject to one immaterial reservation, admitted. It is admitted that if a duty of care towards the Minister in law rested on the searcher he was in breach of it; and, although it is not formally admitted, I find as a fact that the searcher was an employee of the second defendants and that in making the search and preparing the certificate he was acting in the course of his employment.

It is not, of course, suggested that the first defendant is vicariously liable for the negligence of the searcher. What is said is that a statutory duty is imposed on the registrar nominatim. It is recognised that the actual work of searching and preparing the certificate will not be done by him personally although he signs the certificate; but it is said that if the search is such and the certificate is such that an existing entry in the register is not set forth in the certificate, that constitutes a breach by the registrar of the duty imposed on him.

The duty towards the Minister of which the plaintiff alleges that the first defendant is in breach is a duty to be found, if anywhere, in s. 17 (2) of the Land Charges Act 1925 as applied to registrars and registries of local land charges by r. 15 of the Local Land Charges Rules 1934. The duty is twofold: first, to make "the search required", that is to say a search required by a person under s. 17 (1),

"... to be made at the registry for entries of any matters or documents, whereof entries are required or allowed to be made in the registry by ..."

the Land Charges Act 1925. I leave on one side for the moment the point that the compensation notice in the present case was not within those words; its registration was required by the Town and Country Planning Act 1954. I will assume for the moment that the obligation to search applies to it. The search has to be required by means of a requisition for search in accordance with r. 15 (2), which defines the land in respect of which the search is to be made by means of a plan or by any other means sufficient to enable the land to be identified. There is no doubt that a requisition was made in the prescribed form by Parsons, stating that

"a search of the register of local land charges [of the second defendants] is required for subsisting entries against the land defined in a plan annexed to the requisition"

and that the land was sufficiently and correctly identified. And then the second part of the twofold duty is to issue a certificate setting forth the result of the search.

A search or purported search for such entries was made. There is no evidence whether the searcher found the entry relating to the compensation notice. At all events he did not mention it in the certificate. He may therefore have searched and failed to find it, in which case the certificate did in fact set forth the result of the search, albeit of an inadequate search, or he may have found it but failed to record it, in which case the certificate failed to set forth the result of the search. Counsel for the ministry submits that in either case there was a breach of duty towards the incumbrancer imposed by the section. He says that a duty to search means a duty to make an accurate search—a duty not only to seek but to find. He says that the duty is to identify in the index map the land defined in the requisition, to turn to the page or pages in the register whose numbers are overprinted on that land in the index and to note the entries on those pages. A failure to identify the land, provided it is sufficiently defined, to turn to the pages indicated by the index or to note the entries thereon is, he submits, a breach of the duty to search. If the searcher does find an entry and fails to set it forth in the certificate, there is, he says, a breach of the express duty to issue a certificate setting forth the result of the search. These conclusions involve, he submits, not the interpolation or implication of words into the Act and regulations, but merely construing them in their context.

He relies on an unreported case of *Cox & Sons v. Sidery* (1), which is referred to in *Beer v. W. H. Clench* (1930), Ltd. (2). In that case a statutory obligation to keep a record was held to be an obligation to keep an accurate record, "since otherwise the section would be futile". He also relies on *Dawson & Co. v. Bingley Urban District Council* (3), as showing that the provision of erroneous information can constitute a breach of statutory duty. In that case the duty was under s. 66 of the Public Health Act 1875, to cause fire plugs to be provided and maintained and to paint or to mark on the buildings and walls within the streets words or marks near to such fire plugs to denote the situation thereof. What had happened was that the authority had painted a mark on a building or wall which was in the wrong place and denoted a spot where there was not in fact a fire plug, a spot some six feet, ten inches away from the place where the fire plug was inserted in the main, and owing to that there was a delay in putting out a fire in the plaintiffs' premises. It was held that that duty was the duty to mark the buildings or walls so as to denote the situation of the fire plugs, that is to say in such a way as correctly and accurately to denote the position of the fire plugs. I refer to the opening sentences of the judgment of FARWELL, L.J.

Counsel for the ministry submits that there is an absolute duty towards the incumbrancer to make an accurate search and to set forth accurately the result of it. Counsel for the defendants relies on s. 2 (2) of the Conveyancing Act 1882. There the duty was diligently to search. A duty of diligence, he says, is not an absolute duty but a duty of care. Parliament in the consolidation of 1925 omitted the word "diligently". They cannot, counsel for the defendants submits, have intended by its omission to increase the duty from one of care to an absolute duty. He submits that by the omission Parliament intended to indicate that there was not even to be a duty of care. Further, he of course accuses counsel for the ministry of seeking to read into the Act and regulations words which are not there.

(1) (1935), unreported.

(2) 100 J.P. 191; [1936] 1 All E.R. 449.

(3) 75 J.P. 289; [1911-13] All E.R. Rep. 596; [1911] 2 K.B. 149.

Before deciding between these rival submissions, I find it convenient to set out the arguments advanced in favour of and against the proposition that if there is a duty a civil action for damages will lie for breach of it. The principles to be applied are those set out in *Cutler v. Wandsworth Stadium, Ltd.* (1). Counsel for the ministry summarised them as follows: (i) The question is one of the interpretation of the statute in the light of the previous law. (ii) Does it exist for the benefit of the public at large or of a category of persons to which the plaintiff belongs? (iii) If the former, and a specific remedy is provided for its enforcement (e.g., criminal proceedings), no action for breach of statutory duty lies. (iv) If the latter, then—(a) if no specific remedy is provided there is a right of action for breach of statutory duty, (b) even if there is a specific remedy, there may be a concurrent right of action, especially if the specific remedy is not effective to ensure that the duty is performed.

It seems to me that those principles are to be found in the speeches, particularly in those of LORD NORMAND. LORD REID seems to have considered the purpose of the particular section rather than that of the Act as a whole. He said: "For whose benefit was this sub-section intended?"

I find a useful gloss on *Cutler's* case (1) in the judgment of ROMER, L.J., in *Solomons v. R. Gertzenstein, Ltd.* (2), where he said:

"There is nothing inconsistent, however, in including in legislation which is generally designed to regulate in various ways the lives of a vast community provision for the safety and protection of individuals; and, in my opinion, it was the object of s. 133 of the [London Building Acts (Amendment) Act] of 1939 to make provision of this kind."

His approach seems to me to be the same as that of LORD REID in *Cutler's* case (1).

Counsel for the ministry submits that the Land Charges Act 1925 was cast for the benefit of chargees (incumbrancers) of land and of purchasers and intending purchasers of land, and that s. 17 (1), (2) and (3), were included specifically for the benefit of purchasers, intending purchasers and incumbrancers of land, that the fact that a specific remedy is provided for the enforcement of the duty contained therein in s. 17 (5), namely criminal proceedings, is not sufficient to exclude a right of civil action, and that a right of action against a local registrar for breach of the rule incorporating s. 17 (3) is a fortiori not excluded, since s. 15 (6), does not permit a rule to be made imposing a criminal sanction on local registrars.

Counsel for the defendants adopts the statement of the law contained in CHARLESWORTH ON NEGLIGENCE (4th Edn. p. 454), which is set out in the report of *Reffell v. Surrey County Council* (3). He states:

"It has been said, 'No universal rule can be formulated which will answer the question whether in any given case an individual can sue in respect of a breach of statutory duty'. In addition to the general rules set out in the preceding section, however, the most important matters to be taken into consideration appear to be: (a) Is the action brought in respect of the kind of harm which the statute was intended to prevent? (b) Is the person bringing the action one of the class which the statute desired to protect? (c) Is the special remedy provided by the statute adequate for the protection of the person injured? If the first two questions are answered

(1) [1949] 1 All E.R. 544; [1949] A.C. 398.

(2) [1954] 2 All E.R. 625; [1954] 2 Q.B. 243.

(3) 128 J.P. 261; [1964] 1 All E.R. 743.

in the affirmative and the third in the negative then, in most cases, the individual can sue."

Counsel for the ministry accepts that this passage correctly sets out the principle. Dealing first with (a) and (b), counsel for the defendants invited me to look first at the position of the Chief Land Registrar, the reason being that by s. 15 (3) of the Act the local registrar is as regards local land charges subject to the same obligations as the Chief Land Registrar is subject to in regard to a land charge. He submits that the intention of the Act was to provide a central repository of information for the benefit of the public generally. He draws attention to the fact that under s. 16 any person may search, not merely purchasers or intending purchasers. He suggested that for instance persons contemplating lending money, without such a security as would make them purchasers, might search the register of pending actions to see if any bankruptcy petition had been presented. He says, therefore, that there is no definable class of persons for whose benefit the Act or the relevant section of it was passed. If there were such a class he suggested that it was solely purchasers and intending purchasers of land, not chargees and incumbrancers; and he refers to *Du Sautoy v. Symes* (1), where Cross, J., referred to the affection for purchasers shown in the regulations generally. He referred me to *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (2), where "persons using the highway" was not regarded as a definable class distinct from the public generally, and on the other side to *Solomons v. R. Gertzenstein, Ltd.* (3) in which the class of "all persons who might at any time be in any building to which the London Buildings Acts apply" was held to be such a definable class. He referred to two cases under the Merchandise Marks Act 1887 to 1953 *London Armoury Co., Ltd. v. Ever Ready Co. (Great Britain), Ltd.* (4) and *J. Bollinger v. Costa Brava Wine Co., Ltd.* (5), which I do not find of any assistance. He also submitted that actions for breach of statutory duty are confined to cases where physical injury has resulted.

To these arguments counsel for the ministry retorts that the Act was passed to make good a defect in the conveyancing system. It was for the benefit both of purchasers and of chargees. The harm against which the Act as a whole was directed was the danger to an equitable incumbrancer of losing the benefit of his incumbrance through lack of notice to the purchaser, and the danger to the purchaser of taking land subject to legal incumbrances of which he had no notice. Section 17 (3) was obviously in favour of purchasers, and s. 17 (2), if it imposes the duty towards the incumbrancer for which counsel for the ministry contends, to make an accurate search, was a correlative provision in favour of the incumbrancer. There are other duties in the Act (for instance the express duty on the Chief Land Registrar in respect of pending actions under s. 2 (2), and the implied duty, which unquestionably exists in relation to other registrable charges, to enter the charges in the register) which are imposed for the benefit of chargees. The fact that persons other than purchasers and chargees may benefit is accidental, and does not derogate from the fact that purchasers and chargees are the intended beneficiaries of the Act. He submits that an action may lie for breach of statutory duty when the damage is only financial, and cites *Woods v. Winskill* (6).

(1) [1967] 1 All E.R. 25; [1967] Ch. 1146.

(2) [1923] All E.R. Rep. 127; [1923] 2 K.B. 832.

(3) [1954] 2 All E.R. 625; [1954] 2 Q.B. 243.

(4) [1941] 1 All E.R. 364; [1941] 1 K.B. 742.

(5) [1959] 3 All E.R. 800; [1960] Ch. 262.

(6) [1911-13] All E.R. Rep. 318; 82 [1913] 2 Ch. 303.

Dealing with CHARLESWORTH's point (c) and referring still to the Chief Land Registrar and Her Majesty's Land Registry, counsel for the defendants contends that where a duty is imposed only on servants of the Crown the absence of a specific remedy ought not to lead to the presumption that a right of action for breach of statutory duty is intended. The administrative control which the Crown has over its servants and the political remedy which the subject has against the Crown are enough to ensure performance of the duty. He refers by way of analogy to s. 2 (2) of the Crown Proceedings Act 1947. By this argument he seeks to distinguish the observations about pious hopes in *Cutler's* case (1). Counsel for the ministry replies that neither the actual criminal sanction of s. 17 (5) nor the administrative and political control referred to by counsel for the defendants are commensurate with the harm caused to the incumbent by a breach of duty. He loses the benefit of his incumbency for good and all without compensation unless he can recover it by civil action.

Both counsel rely on the provisions of the Land Registration Act 1925. Counsel for the ministry submits that the presence in the Land Registration Act 1925 of s. 131 suggests that without it the registrar would have been liable, and points out that there is no provision in the Land Charges Act 1925 comparable with s. 131 of the Land Registration Act 1925. Counsel for the defendants says that Parliament in the Land Registration Act 1925 expressly recognised the possibility of loss resulting from error in the registry, and provided for compensation out of public funds and for protection for the Chief Land Registrar and his officials provided that they acted in good faith, that it would have been easy to extend this provision to the Land Charges Act 1925 and that since Parliament has not done so this is an indication that compensation is not intended. It is incredible, he said, that Parliament should have protected the Chief Land Registrar and his officials from liability for loss under the Land Registration Act 1925 but left them subject to liability under the Land Charges Act 1925.

Turning to the position of the local land registrar, counsel for the defendants says that if he is right in his argument that the Chief Land Registrar is not liable the same must apply to the local registrar because of s. 15 (3). The differences are that he is not a Crown servant and that there are no criminal sanctions. He submits that criminal sanctions were unnecessary when the Land Charges Act 1925 was passed, since the beneficiary of the charges which were then registrable was in all cases a local authority, and in a vast majority of cases would be the local authority of which the registrar was an officer, so that the direct administrative control exercisable by his employer was enough to ensure the performance of the duty, and that in his case, too, a right of civil action should not be implied.

Both counsel rely on certain general considerations. Counsel for the defendants submits that it is incredible that Parliament should have intended to impose liability for breach of statutory duty on individuals, the Chief Land Registrar or the local land registrar, who would have no right to be indemnified by their employer. Whatever the practice of the Crown may have been, namely to stand behind its servants, the Chief Land Registrar would have had no right to be indemnified by the Crown. Even since the Crown Proceedings Act 1947 this position remains unchanged, and because of s. 2 (2) the Crown cannot be sued in respect of the Chief Land Registrar's breach of statutory duty. The local authority has no power to indemnify the local land registrar, and it is not suggested that the authority can be sued in respect of his statutory duty.

Counsel for the ministry accepts that this is the position, but he finds nothing incredible in it. Parliament would have known of the practice of the Crown to

(1) [1949] 1 All E.R. 544; [1949] A.C. 398.

stand behind its employees; it is unusual to impose statutory duties on the Crown itself; the local land registrar can insure against the liability. He, on the contrary, suggests that it is incredible that Parliament should not have intended to give a right of civil action to persons injured by a breach of the duties imposed by the Land Charges Act 1925 on the Chief Land Registrar and on the local registrars to register incumbrances and to make accurate searches and give correct certificates. The effect of s. 13 of the Land Charges Act 1925, read with s. 199 of the Law of Property Act 1925, was to put the incumbrancer at the mercy of the registrars. He could no longer rely in relation to charges registrable under the Land Charges Act 1925 even on actual notice. The only way he could protect his incumbrance was by registration; and, if the registrar failed to register or a search certificate was given which failed to record the incumbrance which he had registered, the incumbrance, which might be very valuable, was gone. This is really his principal argument; and he prays it in aid both in support of the argument that s. 17 (2) does impose a duty to make an accurate search and in support of the argument that a civil action will lie for breach of it.

I find this a very persuasive argument. Any court will be reluctant to infer that Parliament intended a situation which might lead to a loss of private rights without compensation. In my judgment, the words of s. 17 (2) on their true construction impose on the registrar a duty to include in the certificate all entries which actually subsist on the register, and if this does not happen he is in breach of duty. I do not consider that either the presence of the word "diligently" in the Act of 1882 or its absence in the Act of 1925 throw any doubt on this conclusion. I consider that the Land Charges Act 1925 was passed for the benefit of incumbrancers and purchasers and intending purchasers of land, a definite class distinct from the public generally, and that the duty to give an accurate certificate was for the benefit of incumbrancers. I find no sufficient specific remedy provided, and I do not consider the administrative control and political recourse on which counsel for the defendants relied to be a sufficient ground for excluding a civil remedy.

I answer CHARLESWORTH's (a) and (b) yes, and his (c) no. I add here in parenthesis that the fact that if I am right in what I say hereinafter a claim for damages for negligence will lie against the negligent searcher and his employers does not invalidate the above reasoning: till *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* (1) it was generally believed that no action would lie for negligent words. The contrast between the position under the Land Registration Act 1925 and under the Land Charges Act 1925 is anomalous, but no more anomalous than it would be if there were no civil remedy under the Land Charges Act 1925.

I turn now to the claim against the second defendants alleging vicarious liability for the negligence of the searcher. Both counsel have made copious citations from the speeches in *Hedley Byrne v. Heller* (1). That case decides, as both counsel agree, that there is no rule of law that in no circumstances will an action lie in respect of financial damage suffered as a result of the negligent words. When such an action will lie is the matter which has been argued before me. Counsel for the defendants distils from the speeches the following principle, that such an action will lie only when there is a voluntary assumption of liability by someone who knows that his statements will be relied on in circumstances in which but for the absence of consideration the liability would be contractual. Here, he says, there was no voluntary assumption of liability; the only relationship was created by a statute which compelled the answers to be given.

He relies, firstly, on what was said by LORD REID:

(1) [1963] 2 All E.R. 575; [1964] A.C. 465.

"A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require; or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require."

He also relies on what was said by LORD MORRIS OF BORTH-Y-GEST:

"The inquiry in the present case, and in similar cases, becomes therefore an inquiry as to whether there was a relationship between the parties which created a duty and if so whether such duty included a duty of care. . . . My lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore, if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise."

He relies particularly on what was said by LORD DEVLIN:

"I think, therefore, that there is ample authority to justify your lordships in saying now that the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of LORD SHAW in *Nocton v. Lord Ashburton* (1) are 'equivalent to contract' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied on and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good.

"I have had the advantage of reading all the opinions prepared by your lordships and of studying the terms which your lordships have framed by

(1) [1914-15] All E.R. Rep. 45; [1914] A.C. 932.

way of definition of the sort of relationship which gives rise to a responsibility towards those who act on information or advice and so creates a duty of care towards them. I do not understand any of your lordships to hold that it is a responsibility imposed by law on certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction. In the present case the appellants were not, as in *Woods v. Martins Bank, Ltd.* (1), the customers or potential customers of the bank. Responsibility can attach only to the single act, i.e., the giving of the reference, and only if the doing of that act implied a voluntary undertaking to assume responsibility. This is a point of great importance because it is, as I understand it, the foundation for the ground on which in the end the House dismisses the appeal. I do not think it possible to formulate with exactitude all the conditions under which the law will in a specific case imply a voluntary undertaking, any more than it is possible to formulate those in which the law will imply a contract. But in so far as your lordships describe the circumstances in which an implication will ordinarily be drawn, I am prepared to adopt any one of your lordships' statements as showing the general rule; and I pay the same respect to the statement by DENNING, L.J., in his dissenting judgment in *Candler v. Crane, Christmas & Co.* (2) about the circumstances in which he says a duty to use care in making a statement exists.

"I do not go further than this for two reasons. The first is that I have found in the speech of LORD SHAW in *Nocton v. Lord Ashburton* (3) and in the idea of a relationship that is equivalent to contract all that is necessary to cover the situation that arises in this case. Counsel for the appellants does not claim to succeed unless he can establish that the reference was intended by the respondents to be communicated by the National Provincial Bank, Ltd. to some unnamed customer of theirs, whose identity was immaterial to the respondents, for that customer's use. All that was lacking was formal consideration. The case is well within the authorities I have already cited and of which *Wilkinson v. Coverdale* (4) is the most apposite example.

"I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v. Lord Ashburton* (3) has long stood as the authority and for the latter there is the decision of SALMON, J., in *Woods v. Martins Bank, Ltd.* (1), which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."

Counsel for the defendants also cited to me the very recent case in the High Court of Australia, *Mutual Life and Citizens' Assurance Co. v. Evatt* (5) but, valuable

(1) [1958] 3 All E.R. 166; [1959] 1 Q.B. 55.

(2) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.

(3) [1914-15] All E.R. Rep. 45; [1914] A.C. 932.

(4) (1793), [1775-1802] All E.R. Rep. 339; 1 Esp. 74.

(5) (1968), 42 A.L.J.R. 316.

as the discussion of the principles is in that case, I do not think that for present purposes it assists me.

Counsel for the ministry contends that *Hedley Byrne* (1) is not directly applicable, since the plaintiff here is not a person relying on a representation, but a person whose interests are affected by a representation made to and relied on by someone else. A closer case on the facts is *Everett v. Griffiths* (2). Counsel for the ministry contends that the maker of a careless statement may be liable in tort to a person injured by it even though it is made pursuant to some obligation to make it, for example under a contract with a third party or under statute. Legal responsibility, he says, can arise either from the voluntary making of a particular statement or the voluntary entry into a continuing relationship which involves the making of such statements, or the voluntary assumption of an office or appointment which involves the making of such statements. In the latter two cases it may or may not be possible to disclaim legal responsibility. I note that the form in evidence which was accompanied, as the form contemplates, by the requisition or official search for local land charges, contains in note (ii) a disclaimer of legal responsibility in respect of the replies to enquiries.

As I see it, the emphasis on the voluntary nature of the representation in *Hedley Byrne* (1) was dictated by the facts of that case, and the limitations in the statements of principle were not intended to be universally applicable (see in particular what was said by LORD DEVLIN). He said:

"I regard this proposition as an application of the general conception of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person, any more than in *Donoghue v. Stevenson* (3) the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue v. Stevenson* (3), a specific proposition to fit the case. When that has to be done, the speeches of your lordships today as well as the judgment of DENNING, L.J., to which I have referred—and also, I may add, the proposition in the 'Restatement', and the cases which exemplify it, will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation, for I bear in mind LORD ATKIN's warning, which I have quoted, against placing unnecessary restrictions on the adaptability of English law. I have, I hope, made it clear that I take quite literally the dictum of LORD MACMILLAN, so often quoted from the same case, that 'the categories of negligence are never closed'. English law is wide enough to embrace any new category or proposition that exemplifies the principle of proximity."

Another principle is to be discerned in the speeches, and in cases cited with approval therein, namely that

"persons who hold themselves out as possessing a special skill are under a duty to exercise it with reasonable care."

See, for instance, LORD HODSON and LORD PEARCE. He said:

"In those cases there was no dichotomy between negligence in act and in word, nor between physical and economic loss. The basis underlying them is

(1) [1963] 2 All E.R. 575; [1964] A.C. 465.

(2) 84 J.P. 161; [1920] 3 K.B. 163; *on appeal*, H.L., 85 J.P. 149; [1921] 1 A.C. 631.

(3) [1932] All E.R. Rep. 1; [1932] A.C. 562.

that if persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession, they have a duty of skill and care. In terms of proximity one might say that they are in particularly close proximity to those who, as they know, are relying on their skill and care, although the proximity is not contractual."

Turning to earlier cases, in *Shiells v. Blackburne* (1), LORD LOUGHBOROUGH said:

"I agree with Sir William Jones, that where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the Custom-House, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the Custom-House, such a mistake as this is not to be imputed to him as gross negligence."

In *Everett v. Griffiths* (2) both BANKES, and ATKIN, L.JJ., considered that a duty of care lay on the doctor who had been called in by the justice or chairman under s. 16 of the Lunacy Act 1891 to examine the plaintiff, and that damages could be recovered from the doctor if his negligent certificate was the cause of the plaintiff's wrongful detention in an asylum.

DENNING, L.J., in his dissenting judgment in *Candler v. Crane, Christmas & Co.* (3), which was expressly approved by LORD HODSON and LORD DEVLIN in *Hedley Byrne* (4), referred to—

"... persons, such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business."

Later in the same paragraph, the whole of which is highly relevant, he referred to *Shiells v. Blackburne* (1), and he said:

"From very early times it has been held that they [that is to say persons engaged in a calling which requires special knowledge and skill] owe a duty of care to those who are closely and directly affected by their work apart altogether from any contract or undertaking in that behalf."

Then he cited FITZHERBERT in his *NEW NATURA BREVIVM* (1534) 94d, and went on:

"This reasoning has been treated as applicable not only to shoeing smiths, surgeons and barbers, who work with hammers, knives and scissors, but also to shipbrokers and clerks in the Custom House who work with figures and make entries in books, '... because their situation and employment necessarily imply a competent degree of knowledge in making such entries ...'"

Then he cites *Shiells v. Blackburne* (1).

(1) (1789), 1 Hy. Bl. 158.

(2) 84 J.P. 161; [1920] 3 K.B. 163; *on appeal*, H.L., 85 J.P. 149; [1921] 1 A.C. 631.

(3) [1951] 1 All E.R. 426; [1951] 2 K.B. 164.

(4) [1963] 2 All E.R. 575; [1964] A.C. 465.

Then there are later paragraphs in his judgment which are relevant. The first is as follows:

"Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer, they are not, as a rule, responsible for what he does with them without their knowledge or consent."

Then he said:

"Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of £2,000 which the plaintiff made in reliance on the accounts, because the defendants knew that the accounts were required for his guidance in making that investment, but it does not extend to the subsequent £200 which he invested after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases. Thus, a doctor, who negligently certifies a man to be a lunatic when he is not, is liable to him, although there is no contract in the matter, because the doctor knows that his certificate is required for the very purpose of deciding whether the man should be detained or not, but an insurance company's doctor owes no duty to the insured person, because he makes his examination only for the purposes of the insurance company: see *Everett v. Griffiths* (1), where ATKIN, L.J., proceeds on the self-same principles as he expounded fully later in *Donoghue v. Stevenson* (2). So, also, a Lloyd's surveyor who, in surveying for classification purposes, negligently passes a mast as sound when it is not, is not liable to the owner for damage caused by it breaking, because the surveyor makes his survey only for the purpose of classifying the ship for the Yacht Register and not otherwise: *Humphery v. Bowers* (3). Again, a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply to give information, and not with any particular transaction in mind. When, however, a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction."

I also attach importance to the American case of *Glanzer v. Shepherd* (4), a decision of CARDOZO, C.J., which was referred to with approval by LORD REM and by LORD PEARCE in *Hedley Byrne* (5). The defendant in that case is referred to as a public weigher. It is nowhere stated in the report whether he was obliged to weigh for all and sundry or whether he could pick and choose his customers.

(1) 84 J.P. 161; [1920] 3 K.B. 163; *on appeal*, H.L., 85 J.P. 149; [1921] 1 A.C. 631.

(2) [1932] All E.R. Rep. 1; [1932] A.C. 562.

(3) (1929), 45 T.L.R. 297.

(4) (1922), 233 N.Y. 236.

(5) [1963] 2 All E.R. 575; [1964] A.C. 465.

At all events, that matter was not regarded either in the case itself or in the House of Lords in *Hedley Byrne* (1) as being important.

The searcher in the present case had a responsible job. He plainly either knew or ought to have known that, if he did not use proper care and omitted from the certificate an entry which was there in the register, any incumbrancer against whom the certificate was conclusive would be damaged. I am of opinion that he falls within the class of persons whom DENNING, L.J., and LORD PEARCE had in mind, and that *Everett v. Griffiths* (2) is authority for the proposition that he is under a duty of care towards the incumbrancer and liable to him if he is in breach of it and foreseeable damage results. I do not consider that I am prevented by anything in *Hedley Byrne* (1) from so holding.

On the basis, therefore, that the certificate was conclusive against the Minister I conclude that the searcher was under a duty of care towards the Minister, that he was in breach of it by giving a clear certificate omitting the compensation notice and that the Crown can recover any damage suffered by it from the second defendants.

I turn now to consider the question whether the Crown did suffer damage. In other words, did s. 17 (3) apply to the compensation notice? If it did not, the Crown has suffered no damage, and this action must fail. I have to consider whether or not the provision of the Local Land Charges (Amendment) Rules 1954, which purported to apply to compensation notices under the Act of 1954 that provision of the Local Land Charges Rules 1934, r. 15, which makes applicable s. 17 (3) of the Land Charges Act 1925, is ultra vires or not. If it is ultra vires the ministry must fail. I also have to examine the question, which earlier in this judgment I reserved for later consideration, whether r. 15 is aptly worded to apply s. 17 (3) to charges which are not required or allowed to be registered by the Land Charges Act 1925 but are required to be registered by later Acts.

I must start with a reference to *Stock v. Wanstead and Woodford Borough Council* (3). The headnote in that case discloses facts very similar to those in the present case, but the statement therein of the findings is misleading. As appears from the report, it was conceded—

“that notice of the fact that compensation has been paid is one of those matters which is registrable as a local charge, and is subject to the provisions to which I have referred [which included s. 17 (3)] relating to searches in the local land register.”

All that the judge decided was that on this footing the Minister was a person interested within s. 17 (3), and that the certificate issued to the plaintiff became conclusive negatively in favour of the plaintiff as an intending purchaser of the land which he acquired. No similar concession is made in the present case. I readily follow the judge in what he actually decided. Indeed, I have not been asked to take a different view. If I come to a different conclusion from his it will be because I consider that the concession was wrongly made.

Section 15 (7) of the Land Charges Act 1925, as amended by the Law of Property (Amendment) Act 1926, and the Town and Country Planning Act 1947, applies inter alia, to prohibitions or restrictions contained in a grant of planning permission, which explains why the grant of planning permission to Mr. Neale got on to the register. Since by s. 15 (7), the provisions of s. 15 (1) to (6) are to apply to such prohibitions and restrictions as if they were local land charges, there

(1) [1963] 2 All E.R. 575; [1964] A.C. 465.

(2) 84 J.P. 161; [1920] 3 K.B. 163; on appeal, H.L., 85 J.P. 149; [1921] 1 A.C. 631.

(3) [1961] 2 All E.R. 433; [1962] 2 Q.B. 479.

can be no doubt that s. 15 (6) (d) applies to them, and that rules incorporating s. 17 (3) can validly be made in respect of them. Numerous other pre-1954 statutes provided that the provisions of the Land Charges Act 1925, should apply to conditions, instruments, notices, prohibitions, restrictions, etc., as if they were local land charges, and that they should be registered accordingly. See for instance the Housing (Rural Workers) Act 1926, s. 3 (4), Ancient Monuments Act 1931, s. 11, Civil Defence Act 1939, s. 2, War Damage Act 1943, s. 20 (7), Building Materials and Housing Act 1945, s. 8, and Trunk Roads Act 1946, s. 8 (4). One such Act provided, indeed, that charges made under those Acts should be local land charges and should be registrable under s. 15 of the Land Charges Act 1925 accordingly. Other pre-1954 Acts, on the other hand, provided that matters should be registered in the register of local land charges without providing that the provisions of the Land Charges Act 1925 should apply to them as if they were local land charges. The wording of the formula varies from Act to Act. The Town and Country Planning Act 1944, s. 17, provided that certain orders should be registered "in the prescribed manner"; sub-s. (3) provides as follows:

"The power conferred by sub-section (6) of section fifteen of the Land Charges Act, 1925, to make rules for giving effect to the provisions of that section shall be exercisable for giving effect to the provisions of this section, and in this section the expression 'prescribed' means prescribed by rules made in exercise of that power."

Exactly the same formula is to be found in the Civil Aviation Act 1946, s. 48, the Coast Protection Act 1949, s. 8 (8), the Highways (Provision of Cattle Grids) Act 1950, s. 9 (5), the Public Utilities Street Works Act 1950, Sch. 2, and the Hill Farming Act 1954, s. 2. Substantially the same formula was used in the Agriculture Act 1947, s. 12. The Requisitioned Land and War Works Act 1948, s. 14, provided that rights should not continue to exist under s. 12 of that Act unless they had been "registered in the prescribed manner", and sub-s. (4) is in the same terms as in the foregoing Act. A different formula was adopted in the Town and Country Planning Act 1947, s. 30 (3), and s. 39 (2). Those sub-sections simply provide that the relevant matter shall be registered in the register of local land charges in such manner as may be prescribed in rules made for the purposes of this section under s. 15 (6) of the Land Charges Act 1925, by the proper officer of the council of the county borough or county district; and that formula, too, was used in a number of other Acts and is the formula which appears in the Town and Country Planning Act 1954, s. 28 (5), with which I am concerned in the present case. Under this Act, like the Requisitioned Land and War Works Act 1948, the notice is effective only if it is registered. There are other provisions of the Town and Country Planning Act 1954, to which s. 28 (5) and s. 29 apply. They are to be found in s. 39, s. 46 and s. 57.

There are, then, three classes of provisions: (i) that a matter shall be registered as if it were a land charge; (ii) that a matter shall be registered in the prescribed manner, followed by a provision that—

"the power conferred by the Land Charges Act, 1925, section 15, sub-section (6), to make rules for giving effect to that section shall be exercisable for giving effect to the provisions of this section, and in this section 'prescribed' means prescribed by rules made in exercise of that power";

(iii) that a matter shall be registered in such manner as may be prescribed by rules made for the purpose of this section under s. 15 (6) of the Land Charges Act 1925.

Did Parliament intend something different by using the different formulae? In particular, did Parliament intend to confer power to make rules under all of the paragraphs of s. 15 (6), including power to apply s. 17 (3), in the first case only, or in the first two but not the third case, or in all three cases? Or did Parliament in the second case intend to confer power to make rules only under that part of s. 15 (6) which deals with the mode of registration and in the third case intend to confer power to make rules only as to the manner of registration?

An at first sight attractive argument is that Parliament cannot have intended that in relation to some of the entries in the register an official certificate of search should be conclusive in favour of a purchaser or intending purchaser as against persons interested, but in relation to others it should not be so conclusive. But this state of affairs had on any view already come about by 1954, because of the way in which the rule-making power had been exercised. In certain cases, including some in both the second and third classes, rules had been made purporting to apply to the new category of matters the Local Land Charges Rules 1934, as amended. These rules, by r. 15, apply the Land Charges Act 1925, s. 17 (1), (2), (3), (7), (8) and (9). In other cases, again including some in the second and third classes, special rules had been made which applied the Land Charges Act 1925, s. 17 (1), (2), (7), (8) and (9), but not s. 17 (3). An example of such rules is the Town and Country Planning Acts 1944 and 1947 (Registration of Orders and Lists of Buildings) Rules 1948. These rules relate to two Acts, one of which comes in the second and one in the third class.

Even, therefore, in relation to matters arising under the Town and Country Planning Acts a dichotomy had before 1954 been created between some in respect of which the certificate was conclusive, because they were prohibitions of or restrictions on user to which the Land Charges Act 1925 and the Local Land Charges Rules 1934 applied, and others in respect of which the certificate was not conclusive, because the rules applicable to them did not apply to s. 17 (3). I can therefore find no reason of convenience for suggesting that Parliament must have intended s. 17 (3) to apply to compensation notices under s. 28 (5), of the Town and Country Planning Act 1954.

Nor am I impressed by the argument of counsel for the ministry that to deny the protection of s. 17 (3) to the purchaser or intending purchaser in the case of compensation notices would make registration a pointless formality and a trap. If this is true, then it is a situation which already obtained in regard to matters registered under a number of statutes. He also said that it would amount to going back to the bad old system of notice which registration was intended to do away with. This is not true in the case of compensation notices, since s. 29 (1) makes registration a necessary condition of their effectiveness. But in all other cases falling within the second and third classes this result may well happen anyway, whatever the true view about the conclusiveness of the certificate, since it is doubtful whether s. 198 and s. 199 of the Law of Property Act 1925, and s. 15 (2) and s. 13 (2) of the Land Charges Act 1925 applied to them. They are capable of registration and, if registered, are registered not under the provisions of the Land Charges Act 1925, but under the provisions of the particular Act requiring their registration, and they are not local land charges within s. 15 (1), nor are they to be treated as if they were.

Furthermore, even if counsel for the ministry is right in his submission that the certificate is conclusive there will be a period during which a purchaser runs the risk of being saddled with an incumbrance of which he cannot discover by searching the register, for the compensation notice is only registrable when the compensation becomes payable, which may be only after an appeal to the Lands

Tribunal under s. 27; till then the only way an intending purchaser can get to know of a claim to compensation which may ultimately land him in a liability to repay is by making enquiries of his vendor.

Counsel for the ministry has two other arguments. First, the reference in s. 28 (5) of the Town and Country Planning Act 1954 to registration "by the proper officer" shows that the rule-making power cannot be limited to s. 15 (6) (a), which contains the power to make rules prescribing the mode of registration, but must include that under para. (c), which contains the power for prescribing the proper officer; that if part of para. (c) is validly incorporated all of it must be, including the part dealing with official certificates of search, and that if that part is validly incorporated then para. (d) dealing with the effect of official certificates of search must also be validly incorporated.

The second argument is that, in the alternative, if the only rule-making power incorporated is that under para. (a) and the part of para. (c) dealing with the proper officer, no provision is made for official searches; the only way the purchaser or intending purchaser could discover whether there was a charge registered would be by personal search or by a search carried out voluntarily by the local registrar. Counsel for the ministry seeks to re-inforce this submission by a reference to *Oak Co-operative Building Society v. Blackburn* (1); but the remarks in that case as to the unwisdom of a personal search apply only to the case where an official search and the protection of s. 17 (3) are available, which of course on this argument they are assumed not to be.

The difficulty which counsel for the ministry faces is that his argument requires words to be read into the Act of 1954. Section 29 contains an absolute prohibition on initiating development of land in respect of which a compensation notice is registered under s. 28 and provides for the recovery by the Minister of the amount specified in the notice. The necessary condition for the prohibition and the recovery is registration. In the present case the notice was and remained registered in the manner prescribed by the rules. This is admitted. *Prima facie* the condition is satisfied. Counsel for the ministry is constrained to argue that the words "and with such consequences" must necessarily be implied in s. 28 (5), after the word "manner", and that in s. 29 there must be implied after the words "registered (under the last preceding section)" the words "as to which an official certificate of search shall in favour of the purchaser or intending purchaser be conclusive against the Minister".

The argument of counsel for the ministry would have the anomalous result that, although a negative certificate will protect the intending purchaser who obtained the certificate and his successors in title from repaying the compensation to the Minister, nevertheless if the proposed sale to that intending purchaser went off and either the owner of the land or some other purchaser wished to develop the land they would have to repay the compensation to the Minister unless they, too, were lucky enough to get an incorrect clear certificate.

I have come to the conclusion that s. 28 (5) empowers the Lord Chancellor to exercise the rule-making power under s. 15 (6) of the Land Charges Act 1925 only to the extent that is necessary to prescribe the manner of registration by the proper officer, that is to say to exercise the powers under para. (a) and the first ten words of para. (c). That is what the words of s. 28 (5) seem to me plainly to say, and I see no sufficient reason to imply anything more into them. By s. 29 (1) the condition for recovery of the compensation is registration, and, in my opinion, that means *de facto* registration, which in case of dispute can be proved by production of the register or any other form of proof which is available under the

general law. The conclusion to which I have come is re-inforced by the fact that in other Acts Parliament provided that the Land Charges Act 1925 should apply to certain matters "as if they were local land charges". If that is what they meant in relation to compensation notices I do not understand why they did not say it. The matter to which s. 28 and s. 29, s. 39 and s. 41, s. 46 and s. 57 of the Act of 1954 relate is the repayment to the Minister of public money previously paid out to private individuals, when circumstances have arisen which nullify the reason for the original payment. To hold that the private individual and his successors in title are to be relieved of the obligation to repay such public money in such circumstances because of an error in the registry would require a strained interpretation of the Act, and there is no consideration of justice or equity to tempt a court so to strain the Act. A statutory provision that the omission of a registered incumbrance on a certificate of search is to have the effect of freeing the land of such incumbrance is a serious interference with existing rights and obligations, and I do not think that such a provision should be implied into an Act without compelling reasons, which do not exist here. If the argument of counsel for the ministry is right, then the effect of a negative error would be to deprive the Minister irremediably of the right to recover the compensation from the developer, save in the case where the sale to the intending purchaser who has obtained the certificate goes off. If the intended purchase goes through and the purchaser is the person who develops then it is not possible, as it is in the case of some local land charges, for the position to be restored by the making of a new order. If, on the other hand, counsel for the ministry is wrong, provision could always be made by suitable terms in the contract of sale for an adjustment as between vendor and purchaser in the event of an error in the certificate. I recognise that some difficulty will be caused to purchasers if the certificate is not conclusive, but this sort of difficulty exists already (as I have shown) and I do not find the arguments from inconvenience persuasive.

I consider that the rules of 1954, insofar as they purport to apply to compensation notices the provision in r. 15 of the Local Land Charges Rules 1934, which incorporates s. 17 (3) of the Land Charges Act 1925, are *ultra vires*. Accordingly the clear certificate was not conclusive, and the Minister has suffered no damage. The claim therefore fails.

There is another ground on which I think that the claim would probably fail. Although I did not hear argument on this point, it seems to me that r. 15 is not effective to make certificates conclusive in respect of anything except "matters or documents whereof entries are required or allowed to be made in the registry by" the Land Charges Act 1925. If that is right, then the rules of 1954 are not *ultra vires* for the reasons stated by me above, but are ineffective to apply s. 17 (3) to compensation notices, since they are not required or allowed to be registered by the Act of 1925, but are required to be registered by the Act of 1954. In view of the conclusion to which I have come about *ultra vires*, it is unnecessary for me to decide this point.

Judgment for the defendants.

Solicitors: *Solicitor, Ministry of Housing and Local Government; Beddington, Hughes & Hobart* (for the defendants).

A.F.B.S.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND BRIDGE, J.J.)

June 25, 1969

R. v. BRIXTON PRISON GOVERNOR. Ex parte ATKINSON

Extradition—Time of charge—Fugitive not charged at time of arrest in United Kingdom—Fugitive charged at time when requisition for extradition received—Oppression—Crime based on same facts as crime for which applicant previously convicted—United States of America (Extradition) Order in Council 1935 (S.R. & O. 1935, No. 574), art. 1.

In November, 1968, the applicant pleaded guilty in Louisiana, U.S.A., to attempted armed robbery and was sentenced to 18 years' hard labour. He had fired shots at certain persons in the course of committing the offence. In December, 1968, he escaped from prison, came to England, and was arrested in Manchester on 9th March, 1969. As neither the offence of attempted armed robbery nor the offence of prison breaking was extraditable under the law of England, the United States government sought to extradite him on fresh charges of attempted murder and aggravated burglary arising out of the same incident. The fresh charges were not preferred until 14th March. On 2nd May the applicant was committed to prison. On an application by the applicant for habeas corpus,

HELD: the application must be refused, because (i) since the charges had been preferred at the time when the requisition for extradition was made, the applicant was a "person, who, being accused [was] found within the territory of the [United Kingdom]" within the meaning of art. 1 of the Extradition Treaty of 1931 between the United Kingdom and the United States of America; (ii) it was no part of the magistrate's duty to consider whether the fresh charges laid were oppressive as having been founded on the same facts as the charge to which the applicant had originally pleaded guilty.

Per CURIAM: The court will assume that a friendly State will observe the conditions of an extradition treaty.

MOTION by Arthur Atkinson, detained in Brixton Prison, for a writ of habeas corpus addressed to the governor of the prison, directing him to bring him (Atkinson) before a Divisional Court of the Queen's Bench Division and to quash an order made by the Chief Metropolitan Magistrate under the Extradition Act 1870 that the applicant be admitted to prison pending his extradition to the United States of America.

J. B. R. Hazan, Q.C., and N. H. Freeman for the applicant.

D. C. Calcutt for the United States government.

M. Corkery for the Governor of Brixton Prison.

LORD PARKER, C.J.: In these proceedings counsel moves on behalf of the applicant, Arthur Atkinson, who is now detained in Her Majesty's prison at Brixton pursuant to the warrant of the chief magistrate of Bow Street of 2nd May 1969 pending extradition to the United States of America. The application is for a writ of habeas corpus.

The matter arises in this way. It is admitted that in New Orleans in the State of Louisiana the applicant saw an advertisement which had been put in a local paper by a Mrs. Pita, advertising the sale of jewellery. It is admitted that the applicant, together with another man, got in touch with her on the telephone and arranged to go round to see her that evening. Sure enough that evening these two men went round there; the other man made some excuse to go to the bathroom, while the applicant remained in the main part of the dwelling where there was Mrs. Pita, her brother and sister-in-law, I think and a nephew. The other man in due course came out of the bathroom with a towel round his face brandishing a firearm, and ordered all except Mrs. Pita to go into the bathroom. They quite

clearly said this was a hold-up and they wanted the jewellery. Mrs. Pita kept her head and all the occupants of the flat succeeded in getting out through the back into the street. They were pursued by these two men, the applicant so it is said firing his revolver towards Mrs. Pita. Police officers came on to the scene and two police officers chased these two men, and in the course of the chase it is said that the applicant fired at the two police officers, the suggestion being that that was with intent to murder. In due course they were stopped and were arrested, and undoubtedly arrested for armed robbery. For that the applicant came before the court in New Orleans, and having pleaded guilty to attempted armed robbery, as opposed to the full offence, was sentenced to 18 years' imprisonment. That sentence was imposed on 20th November 1968. On 22nd December the applicant succeeded in escaping from the local prison, and in due course made his way back to Manchester in this country. He was in fact arrested here in March and the matter came, as I have said, before the chief magistrate at Bow Street on 2nd May 1969.

Extradition could not be sought for the offence of breaking prison, nor on the ground that the applicant was a convicted person, because the original offence of attempted armed robbery was not an extradition offence, nor was prisonbreaking. The offences on which extradition was sought were attempted murder of Mrs. Pita, attempted murder of a police officer called Nick, and another police officer called Roth, and in addition on a charge of what is called aggravated burglary. It is quite clear that all those charges which it is now sought to bring arise out of the same incident, if I may call it that, looking at it quite generally. The real basis of this application, and one must come in a moment to the details of how it is put, is that these charges have only been laid with a view to getting the applicant back within the jurisdiction of the United States, and charging him and sentencing him for an offence which is in essence the offence of breaking prison, which is not an extraditable offence.

The specific grounds are as follows: it is said in the first place that the applicant is not a person to whom art. 1 of the treaty between this country and the United States applies in that at the time when he was arrested in this country he was under a provisional warrant dated 8th March 1969, and was not then an accused person. The foundation of this is to be found in the fact that at the time when the provisional warrant was issued, and at the time of his arrest here he had in fact never been charged with these offences for which extradition is now sought. What had happened is by no means clear to me, but there is no doubt that whether as a result of a bargain or not, the district attorney in New Orleans decided that he would not prefer any other charges than the charge of armed robbery for which the applicant was in fact convicted. What other charges he had in mind I do not know, except that it is said that he was "booked", as it was put originally, that is I suppose after arrest, for other charges including these three charges of attempted murder. At any rate those were not proceeded with, and whether as the result of a bargain it matters not; the bargain suggested being, if you will plead guilty to armed robbery or attempted armed robbery we will not proceed with the other charges. It may be that there was no such bargain, that the prosecuting authorities quite rightly rejected the idea of bringing a multiplicity of charges and took the sensible course of choosing the gravest crime and proceeding in effect on that, the armed robbery, and that the bargain that took place, I know not, may have been merely at a later stage to the effect that the prosecution would be prepared to accept a plea to the attempted armed robbery rather than to the full offence. At any rate, for one reason or another, when he was in fact arrested in this country, these charges had not been preferred. Counsel for the applicant

refers the court to art. 1 of the treaty in question, dated 22nd December 1931, which provides:

"The high contracting parties engage to deliver up to each other, under certain circumstances and conditions stated in the present treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in art. 3, committed within the jurisdiction of the one party, shall be found within the territory of the other party."

Counsel for the applicant says very attractively: when he was found here, which was on 8th March 1969, he was not an accused person. Accordingly he does not come within art. 1, and these proceedings are not applicable. I am quite clear in my own mind that there is, as it were, no magic in the word "found"; provided he is an accused person and is in this country at the time when the requisition is made and the matter is dealt with, that is sufficient.

The second point which arises is really the main point, which can be put quite generally as I have already said on the basis that this conduct on the part of the United States authorities was oppressive. No steps, he said, would have been taken but for this escape, and that indeed the other charges were deliberately abandoned. This application is only made, and these charges are only brought because he has escaped and the escaping is not an extraditable offence. Strong reliance is placed on what was said by their Lordships in *Connelly v. Director of Public Prosecutions* (1). It is unnecessary to refer in detail to this well-known case, but it was emphasised over and over again that the courts have an inherent jurisdiction to protect defendants against oppression and against any abuse by the prosecuting authorities of their functions. The only passage that it is just worth citing is that which occurs in the speech of LORD DEVLIN. He summarised his views thus:

"The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment."

Pausing there, counsel for the applicant says that that exactly covers the circumstances of this case. But LORD DEVLIN went on:

"He will do this because as a general rule it is oppressive to an accused for the prosecution not to use r. 3 where it can properly be used, but a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule."

Fully accepting what is said there, I for myself am by no means satisfied that the making of these charges and this requisition for extradition is oppressive within that principle. It may well be that it would be perfectly proper, having regard to the changed circumstances caused by the escape. Be that as it may, for my part I find it impossible to see how the magistrate dealing with this matter by way of committal proceedings can exercise that discretion, which is really the discretion of the High Court. It is not for him to exercise the discretion referred to by

(1) 128 J.P. 418; [1964] 2 All E.R. 401; [1964] A.C. 1254.

LORD DEVLIN, or to decide how the judge of trial will exercise that discretion. So far as this court is concerned, it seems to me that we have no jurisdiction on an application for habeas corpus to consider matters of that sort unless Parliament has given us power to do so. Matters of oppression are specifically dealt with in both the old Fugitive Offenders Act 1881 and the more recent Fugitive Offenders Act 1967, which by s. 8 (2) specifically provides a power which I understand the court would not have but for that provision, namely, that a court on an application for habeas corpus can consider matters of oppression. In my judgment the magistrate, and in turn this court, on an application for habeas corpus, is only concerned to see whether there is a *prima facie* case, and is not concerned to investigate whether the court of trial might view the matter as oppressive.

The third point raised is really a very minor point. Counsel for the applicant draws the court's attention to the fact that in an early affidavit in these proceedings Mr. Garrison, who was the district attorney of the parish of Orleans in the State of Louisiana, states:

"That if [the applicant] should be extradited to the State of Louisiana, United States of America, his prosecution would be limited exclusively to those crimes for which his extradition is specifically requested [so far so good, and then it goes on] and to serve his term of eighteen years in the Louisiana State Penitentiary at Angola, Louisiana, for the crime of attempted armed robbery, said sentence imposed on November 20, 1968."

Undoubtedly if that were to be done it would be a breach of the treaty between this country and the United States. For my part I am by no means satisfied that the United States has any such intention. It may well be that Mr. Garrison's attention has not been drawn to this matter, and for my part I proceed on the basis that a friendly State with whom we are under treaty obligations the one with the other will observe the conditions of the treaty. I have no reason to think, even if it is a matter which concerns this court, as opposed to the Home Secretary, that the United States intend to break the treaty. For these reasons I would dismiss these applications.

MELFORD STEVENSON, J.: I agree.

BRIDGE, J.: I fully agree with LORD PARKER, C.J., that the discretion which counsel for the applicant invites this court to exercise is not one open either to the committing magistrate or to this court in relation to proceedings under the Extradition Act 1870. I would only add that for my part, even if we had such a discretion, I can see nothing in the conduct of the prosecuting authorities in the United States, and more particularly in the State of Louisiana, which could lead us to the conclusion that this was an oppressive course of conduct. In the circumstances which have arisen the resort to extradition for the offences with which the applicant is now charged is the only means whereby the prosecuting authorities can secure that the applicant is brought to justice and properly punished for his offences, if indeed he committed them. I entirely agree that this application should be dismissed.

Application dismissed.

Solicitors: Victor J. Lissack; Rowe & Maw; Director of Public Prosecutions.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND BRIDGE, JJ.)

June 25, 26, 1969

UNITED STATES GOVERNMENT v. ATKINSON

Magistrates—Case Stated—Extradition proceedings—Refusal to commit—Competence of appeal—Magistrates' Courts Act, 1952, s. 87 (1).

Where a magistrates' court has refused to commit in proceedings under the Extradition Act, 1870, an appeal lies from their decision by way of Case Stated, in virtue of s. 87 (1) of the Magistrates' Courts Act, 1952.

Extradition—Autrefois convict—Conviction of armed robbery—Fresh charge of aggravated burglary.

In November, 1968, the appellant pleaded guilty in Louisiana, U.S.A., to attempted armed robbery and was sentenced to 18 years' hard labour. He escaped from prison and came to England in December 1968, and was arrested in Manchester on 9th March 1969. Neither attempted armed robbery nor prison breaking were extraditable offences under English law. On 14th March 1969 proceedings were started in the State of Louisiana charging the respondent, inter alia, with aggravated burglary, which was an extraditable offence under English law. Proceedings for extradition were started, but the magistrate refused to commit on the ground that a plea of autrefois convict would be maintainable by the respondent.

HELD (per LORD PARKER, C.J., and MELFORD STEVENSON, J.): the availability of a plea of autrefois convict did not depend on whether the facts examined on the trial of each of the offences were the same, but on whether the facts necessary to support a conviction for each offence were the same; (per BRIDGE, J.) armed robbery was not in law the same offence as aggravated burglary; and, therefore, the plea of autrefois convict would not have been available to the respondent, and the magistrate was wrong in refusing to convict.

CASE STATED by the Chief Metropolitan Magistrate at Bow Street.

On May 2, 1969, the Chief Magistrate refused an application by the appellant, the government of the United States, for an order that the respondent be committed to prison pending extradition proceedings in respect of offences alleged to have been committed by him in the United States.

D. C. Calcutt for the appellant.

Hazan, Q.C., and N. H. Freeman for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of the Chief Metropolitan Magistrate on 2nd May 1969 whereby he refused to make an order under s. 10 of the Extradition Act 1870 committing the respondent to prison with a view to his extradition to the United States of America for an alleged offence of aggravated burglary. The history of this matter and the facts giving rise to the extradition proceedings have already been dealt with by this court in an application by the respondent for a writ of habeas corpus (1). But it is I think convenient to summarise them insofar as they are relevant to the present proceedings. They are indeed fully set out in the Case Stated and are not in dispute.

Quite shortly, on 5th October 1968 a Mrs. Pita of New Orleans in the State of Louisiana, caused an advertisement to appear in the local paper advertising certain jewellery. She had a telephone call that evening from someone, who arranged to come round later in the evening to see her. In due course the respondent and a man called Wagner came to her door and on an excuse that Wagner wanted to go to the bathroom, they both came in. A time came when Wagner came out of the bathroom with a towel round his face, brandishing a firearm

(1) Ante p. 617.

and ordered Mrs. Pita's relations who were in the house to go into the bathroom. The respondent also produced a firearm and threatened Mrs. Pita. In fact Mrs. Pita and the others succeeded in getting out of the house, followed by these two men, and the respondent it is said fired his revolver at Mrs. Pita. As a result of that on 22nd October 1968 an information was preferred in the State of Louisiana charging the respondent with the armed robbery of Mrs. Pita. That was the only information laid at that stage. On 15th November a plea of guilty to attempted armed robbery was accepted and he was sentenced to a term of 18 years' hard labour in the local penitentiary. On 22nd or 23rd December, however, he succeeded in escaping from prison and made his way back to this country, where on 9th March 1969 he was arrested at Manchester. Neither the crime of attempted armed robbery nor the crime of prisonbreaking are extraditable offences, and it was no doubt for that reason that on 14th March 1969 an information was laid in the State of Louisiana charging the respondent, *inter alia*, with what is called aggravated burglary, and a warrant for his arrest was issued on the basis of which extradition proceedings were sought.

It is important to realise what the offences of armed robbery and aggravated robbery consist of under the law of Louisiana. Armed robbery is defined as:

"... the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation while armed with a dangerous weapon."

Aggravated burglary is defined as:

"... the unauthorised entering of any inhabited dwelling... where a person is present, with intent to commit a felony or any theft therein if the offender is armed with a dangerous weapon...".

The learned magistrate expressed his opinion in this form:

"I was of the opinion that the facts relied upon to support the offence of burglary were substantially the same as those which related to the offence of attempted armed robbery, and that the offence of attempted armed robbery, in the circumstances set forth in the evidence, was in effect the same offence as that of aggravated burglary, upon which the appellant now sought to prosecute the respondent. I accordingly held that the plea of *autrefois* convict succeeded, and I therefore refused to make an order committing the respondent to prison in respect of the charge of burglary."

The question falling for the opinion of the court is whether, in accepting a plea of *autrefois* convict and in refusing to make an order committing the respondent on the charge of burglary, the magistrate came to a correct decision in law.

Before dealing with the point on which the opinion of the court is sought, it is necessary to determine a preliminary objection which has been taken on behalf of the respondent that these proceedings by way of appeal are misconceived in that there is no power in the prosecution to appeal by way of Case Stated from such a refusal to commit, and no jurisdiction in the magistrate to state a Case. It is indeed a novel point; no attempt to appeal by way of Case Stated ever having so far as I know been made in regard to a refusal to commit under the Extradition Act 1870 or indeed in regard to a refusal to commit by examining justices for an alleged offence committed in this country. At first sight indeed it seems surprising that in such proceedings an appeal by the prosecution by way of Case Stated should lie. Prior, at any rate, to 1952 it was, to say the least, doubtful whether it would lie, the only right of appeal being from a court of summary jurisdiction. In this connection, it is to be observed that it

was held in *Boulter v. Kent Justices* (1) that licensing justices were not a court of summary jurisdiction. By analogy it would appear that a magistrate conducting committal proceedings under the Extradition Act 1870 would likewise not be a court of summary jurisdiction.

However, in 1952 the Magistrates' Courts Act 1952 was passed, under which the power to state a Case is to be found in s. 87 (1). It provides as follows:

"Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved . . ."

"Magistrates' court" which was an expression new in this field, was defined by s. 124 (1) in these terms:

"In this Act the expression 'magistrates' court' means any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law."

Here the magistrate was clearly acting under an enactment, namely the Extradition Act 1870, and the words used in s. 87 (1) "... aggrieved by the ... order, determination or other proceeding of the court" are extremely wide, and would appear to cover a refusal, as in this case, to commit. Moreover, in *Jeffrey v. Evans* (2), this court held that at any rate since 1952 an appeal lay by way of Case Stated from a decision of licensing justices, and that case was cited with approval by the Court of Appeal in the later case of *R. v. East Riding Quarter Sessions, Ex p. Newton* (3), holding there that an appeal also lay to quarter sessions from licensing justices acting under the Public Health Acts. Surprising, therefore, as it may at first sight seem, I think that such an appeal does lie, and accordingly I would reject the preliminary objection and hold that the magistrate had jurisdiction, as he himself must have thought, to state a Case.

Accordingly I turn to the point raised for the opinion of this court. The magistrate, as I have already said, expressed his opinion in these terms, and I will read it again:

"I was of the opinion that the facts relied upon to support the offence of burglary were substantially the same as those which related to the offence of attempted armed robbery, and that the offence of attempted armed robbery, in the circumstances set forth in the evidence, was in effect the same offence as that of aggravated burglary, upon which the appellant now sought to prosecute the respondent. I accordingly held that the plea of autrefois convict succeeded . . ."

In arriving at that opinion and that conclusion, the magistrate was undoubtedly seeking to apply the law as laid down in *Connelly v. Director of Public Prosecutions* (4). In my judgment, however, he has not properly applied the true test there laid down. The true test is, I think, succinctly put by LORD MORRIS OF BORTH-Y-GEST, when he said:

"It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or

(1) 61 J.P. 532; [1897] A.C. 556.

(2) 128 J.P. 252; [1964] 1 All E.R. 536.

(3) [1967] 3 All E.R. 118; [1968] 1 Q.B. 32.

(4) 128 J.P. 418; [1964] 2 All E.R. 401; [1964] A.C. 1254.

crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction. Applying to the present case the law as laid down, the question is whether proof that there was robbery with aggravation would support a charge of murder or manslaughter. It seems to me quite clear that it would not. The crimes are distinct. There can be robbery without killing. There can be killing without robbery. Evidence of robbery does not prove murder or manslaughter. Conviction of robbery cannot involve conviction of murder or manslaughter. Nor does an acquittal of murder or manslaughter necessarily involve an acquittal of robbery. Nor on a charge of murder or manslaughter could a man be convicted of robbery. That the facts in the two trials have much in common is not a true test of the availability of the plea of *autrefois acquit*. Nor is it of itself relevant that two separate crimes were committed at the same time so that in recounting the one there may be mention of the other."

In other words it seems to me, the question is not a question of whether the actual facts examined on the trial of each of the offences are the same, but whether the facts necessary to support a conviction for each offence are the same. To the same effect is LORD HODSON, and this is the only further passage I desire to quote. He said:

"The two offences, murder or manslaughter on the one hand and armed robbery on the other, are not the same, and the second charge could be proved without reference to the death of the murdered man who met his death on the occasion of the robbery. Even if the same evidence is given to prove separate offences it is well settled that whether or not the facts are the same in both trials is not the true test; the test is whether the acquittal on the first charge necessarily involved an acquittal on the second . . ."

Here as it seems to me it is clear that there can be an attempted armed robbery without there being an aggravated burglary, and there can be an aggravated burglary without there being an attempted armed robbery. Indeed as it seems to me the pleas of *autrefois convict* and *autrefois acquit* being pleas in bar which are decided before the evidence in the later case is known, the validity of the pleas depends on the legal characteristics of the two offences in question, namely whether the facts necessary to support a conviction in each case are the same, and do not depend on whether the actual facts thereafter given in evidence are the same. In the result, I would allow this appeal and send the case back with a direction to the learned magistrate to commit on the charge of aggravated burglary.

MELFORD STEVENSON, J.: I agree.

BRIDGE, J.: I also agree on both points of jurisdiction and *autrefois convict*, and I add only a short word on the second point out of respect to the learned magistrate from whom we are differing, and in deference to the argument of counsel for the respondent.

In his speech in *Connelly v. Director of Public Prosecutions* (1) LORD MORRIS OF BORTH-Y-GEIST examined very fully the authorities dealing with the principle of *autrefois acquit* and *autrefois convict*; he enunciated five propositions which he stated are established by principle and authority. Counsel for the respondent's argument, and no doubt the conclusion reached by the learned magistrate, was founded largely on the third and fourth of those propositions which were stated in these terms:

(1) 128 J.P. 418; [1964] 2 All E.R. 401; [1964] A.C. 1254.



"... (iii) that the same rule [namely that a man cannot be tried for a crime of which he has previously been convicted] applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted; (iv) that one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty; ..."

Taken in isolation and read out of their context, those two propositions might be understood as lending support to the argument of counsel for the respondent and the conclusion reached by the learned magistrate. They are of course clarified and explained by the later passages in the speech of LORD MORRIS himself, one of which has already been cited by LORD PARKER, C.J., and which I need not read again. The whole matter seems to me the most succinctly put in a short passage from the speech of LORD DEVLIN where he said:

"For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. Robbery is not in law the same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment), and so the doctrine does not apply in the present case. I would add one further comment. [LORD MORRIS OF BORTH-Y-GEST] in his statement of the law, accepting what is suggested in some dicta in the authorities, extends the doctrine to cover offences which are in effect the same or substantially the same. I entirely agree with [LORD MORRIS OF BORTH-Y-GEST] that these dicta refer to the legal characteristics of an offence and not to the facts on which it is based..."

Applying the language of LORD DEVLIN *mutatis mutandis* to the facts of the present case, attempted armed robbery is not in law the same offence as aggravated burglary, and so the doctrine does not apply in the present case.

Appeal allowed.

Solicitors: *Rowe & Maw; Victor J. Lissack.*

T.R.F.B.

KENT ASSIZES

(MOCATTA, J.)

May 13, 1969

R. v. FORDHAM

Criminal Law—Firearm—Possession—Suspended sentence—Possession before expiration of five years from imposition of sentence—Firearms Act, 1968, s. 21 (2).

By s. 21 (2) of the Firearms Act, 1968: "A person who has been sentenced to Borstal training, to corrective training for less than three years or to imprisonment for a term of three months or more but less than three years, or who has been sentenced to be detained for such a term in a detention centre or in a young offenders institution in Scotland, shall not at any time before the expiration of the period of five years from the date of his release have a firearm or ammunition in his possession."

This sub-section does not apply to a case where the accused person has been sentenced to a suspended sentence of imprisonment and is found to have a firearm or ammunition in his possession before the expiration of five years from the imposition of that sentence.

TRIAL of Kenneth Richard Fordham, who was charged on an indictment with, being a person who, on Nov. 15, 1968, at Deal Quarter Sessions, had been sentenced to imprisonment for a term of two years suspended for two years, having, at Epthorne on April 12, 1969, in his possession three firearms and a box of ammunition, i.e., before the expiration of five years from the date of his suspended sentence, contrary to s. 21 (2) of the Firearms Act 1968. These facts were admitted by the defendant.

J. M. Drinkwater for the Crown.

R. Laurie for the accused.

MOCATTA, J., in directing the jury, said: It now falls to me to determine the true construction of s. 21 (2) of the Firearms Act, 1968. If the construction of the subsection is that for which the Crown contends, then on the admitted facts in this case the accused has committed this offence, and it would be your duty to convict him. On the other hand, if the true construction of s. 21 (2) is that that subsection does not apply to a person subject to a suspended sentence, then on my direction you will acquit the accused.

The origin of s. 21 (2) of the Firearms Act 1968, is to be found, so far as the researches of counsel have gone and have been brought to my attention, in the Firearms Act 1937. Under s. 21 (1) of that Act it was provided that:

"Subject to the provisions of this section, a person who has been sentenced to penal servitude or to imprisonment for a term of three months or upwards for any crime shall not, at any time during a period of five years from the date of his release, have a firearm or ammunition in his possession."

The Firearms Act 1965, s. 9 (3), made (inter alia) an alteration of some importance to that provision by substituting the words, "shall not at any time before the expiration of the period of five years from the date of his release", for "shall not, at any time during a period of five years from the date of his release". It was suggested for the defence that the reason for the change was to cover the case of an escaped prisoner who became possessed of a firearm. However this may be, the alteration, as was argued for the Crown, appears to make clear that the initiation of the ban imposed by the subsection is the date of the sentence, whatever difficulties there may be in ascertaining the date of its expiry by reference to the five years period.

HIS LORDSHIP read s. 21 (2) of the Firearms Act, 1968, and continued: The present Act under which this indictment is laid, namely, the Firearms Act 1968, is purely a consolidating Act. Consolidating Acts of Parliament are passed for the convenience of the public and lawyers, and are not intended to alter the law. They are intended to collect it in a revised form and thus make reference to and ascertainment of the law simpler. Accordingly, they are subject to a somewhat different treatment in the legislature, and are not fully debated as are new Acts of Parliament seeking to alter the law or create entirely new law. *Prima facie*, therefore, one would expect the wording of the Act of 1968 to have the same effect as the similar wording in the Act of 1937 as amended by the Act of 1965.

In 1967, however, the Criminal Justice Act 1967 was passed, and that Act, apart from introducing a number of exceedingly important changes in procedural matters in relation to criminal law, instituted for the first time in the law of England the concept of a suspended sentence. This concept had been one known on the continent, certainly in France, for a number of years. It differs in certain important respects from probation, which otherwise does have some similarity to suspended sentences. That Act, in s. 39 (1), provided that a court passing a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in that order, which should be not less than one year or more than three years, the offender should commit another offence punishable with imprisonment. That section was applied to the accused here by Deal Quarter Sessions in November 1968, when, for an offence of shopbreaking and four additional cases which the accused asked quarter sessions to take into account, they passed on him a sentence of two years imprisonment suspended for two years.

Section 40 of the Act of 1967 dealt with the powers of the court when a person on whom a suspended sentence had been passed was convicted of another offence during the period of suspension. It dealt with that by providing that a court might order that the suspended sentence should take effect, or might order that it should take effect with certain alterations, or in certain circumstances might, if it thought it would be unjust that the original sentence should then take effect, not order that it should.

On the admitted facts in this case the accused had in his possession, during the period of suspension of two years, three firearms and a box of ammunition, and accordingly, if s. 21 (2) applies to a person subject to a suspended sentence, there is no doubt that he comes within its provisions. There is an express provision in s. 21 (6) whereunder a person, prohibited from having in his possession a firearm by virtue of (inter alia) sub-s. (2), may apply to quarter sessions for the removal of the prohibition, but no such application was made by the accused.

Counsel for the accused has argued that the agreed facts in this case do not, on the true construction of s. 21 (2), show that the accused committed any offence. Section 21 (2), it is argued, has no application to suspended sentences. Counsel for the accused drew my attention to an important provision in s. 39 of the Criminal Justice Act 1967 dealing with suspended sentences. Section 39 (9) (a) provides:

"a suspended sentence which has not taken effect under the next following section shall be treated as a sentence of imprisonment for the purposes of all enactments and instruments made under enactments except any enactment or instrument which provides for disqualification for or loss of office, or forfeiture of pensions, of persons sentenced to imprisonment."

Legislation by general reference of this type not infrequently raises problems

of construction as it has here. If one applies that subsection to the beginning of s. 21 (2) of the Firearms Act 1968, counsel for the accused argued, the end of the latter subsection created very great difficulty. The word "release" in the subsection of this consolidating Act, according to the argument of counsel for the accused, must refer to release from actual imprisonment. At the time both of the Act of 1937 and the Act of 1965 there is no doubt that "release" did mean release from imprisonment (or from custody, because, as amended by the Act of 1965, the section in question dealt with Borstal training and detention as well as with imprisonment). The argument ran that it would be quite unreasonable and straining the use of the English language to give the word "release" two different meanings dependent on whether a sentence was suspended or not. Moreover it was urged that the court should, if possible, adopt a construction in favour of the subject, since the Firearms Act 1968 is a penal statute. The maximum penalty for this particular offence under s. 21 (2) on indictment is three years' imprisonment.

For the Crown it was urged that the court should give effect to the terms of s. 39 (9) (a), which were mandatory. The word "release", so it was argued, presented no real difficulty against that background, since it could mean, without straining the language, either release from custody or release from liability to custody under the sentence in question. The ban would therefore start with the sentence; its duration would depend on what happened after. The argument for the Crown in relation to how s. 21 (2) would work on the Crown's construction in relation to a suspended sentence was illustrated by examples given by counsel for the Crown. Suppose a person is sentenced to one year's imprisonment, suspended for two years by the court. In that event if that individual should never serve his sentence because he conducts himself properly during the period of suspension and commits no other crime, then the period of five years from the date of his release, according to the subsection, would begin to start at the end of two years from the passing of the sentence. If, on the other hand, the individual in question by reason of committing another offence should have to serve the one year's sentence, then the period of five years would begin from the time of his actual release from custody.

It was conceded by counsel for the Crown that his construction might result in an anomaly in that the person serving the sentence originally suspended might, by reason of remission earned during such service, cause his period of five years to start, and therefore to end, earlier than in the case of the individual who committed no other offence, never went to prison, and therefore could not claim that his five years began to run earlier than two years after the sentence was imposed. An anomaly of this type makes one doubt the validity of the construction argued for.

Moreover, in my judgment there would be another anomaly of perhaps an even more extreme and absurd nature if the argument of the Crown were right. According to the Firearms Act 1968, with certain exceptions which I need not detail, it is an offence for a person to be in possession of a firearm without having an appropriate firearms certificate obtainable from chief constables. A person properly in possession of such a firearms certificate may commit a crime which has nothing whatever to do with that firearm or any firearm. He may then either receive a sentence of imprisonment, which he has to serve, or he may receive a suspended sentence. If he receives a sentence of imprisonment which he has to serve and leaves the dock to go to prison after the judge has passed sentence, it cannot be said for the purposes of an Act creating a criminal offence

that he is any longer in possession of a firearm which he has at his home since it has ceased to be under his control, and therefore he is not in any difficulty in relation to the Firearms Act 1968 at that moment of sentence. If, on the other hand, the judge passes a suspended sentence on such a person, and that person leaves the dock a free man unless and until he commits another offence, ipso facto and automatically he is committing another offence, namely one under this section, because he would remain in possession and control of the firearm at his home. Thus if this Act applies, as is argued by the Crown, to a person on whom a suspended sentence has been passed, at the very moment of passing that sentence that person could no longer lawfully have that firearm in his possession, and could only properly have that firearm in his possession thereafter (before the expiry of the five year period) as the result of an application to quarter sessions for permission to have it under s. 21 (6).

I did not find it possible to accede to the argument of counsel for the Crown seeking to avoid that position. It does not appear to me, as was argued, that there must be some implication in s. 21 of the Firearms Act 1968 that unless and until the chief constable revokes a firearms certificate, the provisions of s. 21 (1) and (2) have no application to the firearm covered by it. That seems to me an artificial construction, and in conflict with the provisions of s. 21 (6), expressly providing a method whereby one can avoid the application of s. 21 (1) and (2).

These two anomalies, in addition to the inherent difficulty in reading the word "release" in the two alternative senses argued for by the Crown, have persuaded me that the argument advanced on behalf of the accused in this case is correct, notwithstanding the apparently mandatory terms of s. 39 (9) (a) of the Act of 1967. Those terms cannot force the court to apply a strained meaning to the word "release", which in turn could cause anomalies and injustice.

In my judgment, therefore, s. 21 (2) has no application to suspended sentences of imprisonment, and it follows that the accused has in law committed no offence here on the agreed facts. Accordingly I direct you, members of the jury, for the reasons I have given, to find the accused not guilty of this charge.

Solicitors: *A. C. Staples, Maidstone; Girling, Wilson & Harvie.*

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(FENTON ATKINSON, L.J., MELFORD STEVENSON AND JAMES, JJ.)

June 10, 1969

R. v. McCORMACK

Criminal Law—Trial—Sexual intercourse with girl under sixteen—Verdict of lesser offence—Indecent assault—Discretion of judge—Criminal Law Act 1967 (c. 58), s. 6 (3).

An indictment which alleges unlawful sexual intercourse with a girl under 16 necessarily includes an allegation of indecent assault on the same girl. On an indictment alleging the major offence, it is within the discretion of the trial judge to leave to the jury the possibility of conviction of the lesser offence even though the prosecution have not referred to it, and he should do so whether there is plain evidence of the lesser offence.

Criminal Law—Indecent assault on female—Girl under sixteen—Consent—No evidence of hostility.

Any indecent touching of a girl under 16 is an indecent assault even though the girl may have willingly consented to it and though there has been no compulsion or hostility on the part of the defendant.

APPEAL by Patrick Eugene McCormack against his conviction at Hertfordshire Quarter Sessions of indecent assault, when he was sentenced to one month's imprisonment to run concurrently with two concurrent sentences of three months' imprisonment he was then serving for motoring offences.

P. J. Hunt for the appellant.

Elizabeth Harper for the Crown.

FENTON ATKINSON, L.J., delivered this judgment of the court. On 18th December 1968 at Hertfordshire Quarter Sessions before the learned deputy chairman the appellant was acquitted of unlawful sexual intercourse with a girl under the age of 16, but was convicted of indecent assault on the same girl. He was sentenced to one month's imprisonment, but that was to run concurrently with a three months' sentence passed on him one month before for a different class of offence. He now appeals against conviction on a certificate given by the learned deputy chairman, and the certificate was granted on two different points: (i) Was he right in ruling that he had no discretion not to direct the jury on an alternative offence where the offence charged in the indictment amounted to or included such alternative offence irrespective of whether the prosecution had at any stage of the trial invited the jury to consider the alternative offence? and (ii) Was he right in directing the jury to the effect that where there was no evidence of hostility a charge of indecent assault on a girl of this age might yet lie? Those were the two points.

The facts, shortly were these. The girl was aged 15, and the appellant was 22. It was common ground that they spent the night of 10th/11th August 1968 in bed together. In the same room in another bed there was another couple of similar ages. The young man in that case pleaded guilty to two counts of unlawful sexual intercourse with his young girl friend, and he was fined. The girl in the present case said that with her full consent the appellant had intercourse with her, and she said that she had in fact just finished menstruating the day before.

The appellant had two defences to put forward—(i) He was under the age of 24, and he claimed that he believed (and had reasonable grounds for believing) that the girl was over the age of 16. The evidence on that appears to have been extremely sketchy. The issue was left to the jury, but it appears really that he had

no thoughts about the matter of the girl's age at the relevant time. His second defence was that he did not in fact have intercourse with the girl. He said that he had got into bed with her with that intention in his mind, but he had then discovered she was menstruating (she was wearing some sort of pad) so that he did not attempt intercourse. But he himself said in the plainest terms that they had indulged in certain acts of sexual intimacy, and he admitted in evidence that he had inserted a finger into the girl's vagina. It might be thought that manifestly on his own admission he had been guilty of an indecent assault, the girl's consent in this contest being no answer. Of course, as has been held many times, the statutory defence now contained in s. 6 (3) of the Sexual Offences Act 1956 is only applicable to the full offence, and, in spite of criticisms on many occasions in this court of that remarkable anomaly, the law was re-enacted by Parliament in the old form as recently as 1956. On this occasion the indictment contained one count only for the full offence.

At the close of the evidence in the case, and before counsel's speeches, the learned deputy chairman drew counsel for the Crown's attention to para. 2908 of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.), which includes the possibility of conviction for lesser offences, including indecent assault. Counsel for the Crown, who was prosecuting, said that the paragraph certainly was present to her mind, but she said she thought it would be better to leave any direction to the learned deputy chairman. She said:

"It seems to me that it would be much better for it to be given once rather than three times. I was proposing to say nothing much about that but merely to examine the evidence."

In other words, it seems to me that she was not, in any sense, abandoning the possibility of conviction for a lesser offence, but she thought it right to leave any direction to the learned deputy chairman when he came to sum up. In fact, in her closing speech we are told that she did not specifically refer to the possibility of conviction for indecent assault. After counsels' speeches had been made, and before the summing-up, the learned deputy chairman then heard certain lengthy submissions arising, first of all, on s. 6 (3) of the Criminal Law Act 1967, which provides:

"Where, on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence . . ."

The learned deputy chairman took the view—and we think he was absolutely right—that the indictment alleging an act of unlawful sexual intercourse with a girl under the age of 16 necessarily included an allegation of an indecent assault on that same girl.

Then there followed an argument by counsel for the appellant, which he has repeated to this court and put very attractively before us, whether, in view of the girl's consent, there could be a conviction of indecent assault, there being here a willing girl and no evidence of any compulsion or hostility; and he referred to a line of authorities such as *Fairclough v. Whipp* (1) and *Director of Public Prosecutions v. Rogers* (2), cases which have shown that where the accused adult invites a child, for example, to touch his private parts, but exercises no sort of compulsion

(1) 115 J.P. 612; [1951] 2 All E.R. 834.

(2) 117 J.P. 424; [1953] 2 All E.R. 644.

and there is no hostile act, the charge of indecent assault is not appropriate. But, in our view, that line of authorities has no application here, and, in the view of the members of this court, it is plain beyond argument that if a man inserts a finger into the vagina of a girl under 16 that is an indecent assault, in view of her age, and it is an indecent assault however willing and co-operative she may in fact be.

It is said that the prosecution had not specifically run indecent assault as a possible verdict for the jury to consider, and it is said, therefore, that the learned deputy chairman had a discretion whether or not to leave that matter to the jury, and there was some discussion about that and counsel for the Crown submitted to the deputy chairman that it was his duty to put all the alternatives. The deputy chairman said:

"I would like to know whether I have a discretion not to do it. Frankly, I would exercise that discretion."

In fact, he went on to decide that he had no discretion in the matter, he left the alternative of indecent assault to the jury and the jury convicted. Indeed, on our view as to what constitutes an indecent assault on a girl under 16, and in fact of the appellant's own evidence, there was no possible answer to such a lesser charge.

The view this court has formed is that the learned deputy chairman did have a discretion in the matter. Cases vary so infinitely that one can well envisage a case where the possibility of conviction of some lesser offence has been completely ignored by both prosecution and defence—it may be that the accused has never had occasion to deal with the matter, has lost a chance of giving some evidence himself about it or calling some evidence to cover or guard against the possibility of conviction of that lesser offence—and in such a case, where there might well be prejudice to an accused, it seems to this court there must be a discretion in the trial judge whether or not to leave the lesser offence to the jury.

But that was not the situation here, and on the facts of this case we think plainly it would have been a wrong exercise of discretion not to leave this question of indecent assault to the jury, because this was a case where the appellant himself had given evidence and had said on oath "True I did not have intercourse, but I did do that which amounts to an indecent assault". In view of that perfectly plain evidence which he had given, we think the only right course for the learned deputy chairman to take was to do what he did and to leave that matter to the jury. For those reasons this appeal will be dismissed.

Appeal dismissed.

Solicitors: Registrar of Criminal Appeals; Wynter, Davis & Lee, Hertford.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND BRIDGE, JJ.)

July 4, 1969

WEBBER v. CAREY

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Breath test—Device—Instructions for use of device—Compliance with instructions essential—Road Safety Act, 1967, s. 7 (1).

By s. 7 (1) of the Road Safety Act, 1967: "... 'breath test' means a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out, by means of a device approved for the purpose by the Secretary of State, on a specimen of breath provided by that person."

To comply with this definition the test must be carried out not only by means of an approved device, but also in accordance with the relevant instructions appearing on the device, including that which requires 20 minutes to elapse between the last drink and the taking of the test. Unless these instructions have been observed, the test is not a valid test for the purposes of s. 7 (1), and no valid arrest on a charge of driving with blood-alcohol proportion above the prescribed limit can be made.

Per CURLIAM: There is no duty, as such, on a police officer to make enquiries when a potential defendant had his last drink. Each case depends on its circumstances.

CASE STATED by St. Albans justices.

On 21st October 1968 an information was preferred by the appellant, Michael Guy Webber, against the respondent, Michael Percival Carey, that he, on 10th October 1968 in the city of St. Albans drove a motor vehicle, namely, a motor Dormobile, on a road called Sandridge Road having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provided a specimen under s. 3 of the Road Safety Act 1967, exceeded the prescribed limit at the time he provided the specimen, contrary to s. 1 (1) of the Road Safety Act 1967.

On the hearing of the information at St. Albans' Magistrates' Court on Dec. 17, 1968, the following facts were found. The "breath tests" were carried out by means of the device called "Alcotest ® 80". A sample box of the device was produced to the justices. There were "Instructions" for its use attached to the box together with an instruction booklet contained in the sample box. The first of these instructions was that the device should not be used to test a person who had consumed alcohol within the last 20 minutes and other instructions were that the bag of the device should be inflated by one single breath in not less than ten and not more than 20 seconds and that the person should not smoke during or have been smoking immediately prior to the test. The respondent was at all material times a driver of a motor vehicle on a road and the police officer who stopped the vehicle driven by the respondent had reasonable cause to suspect the driver of the vehicle of having alcohol in his body. One of the police officers who stopped the respondent required him to provide a specimen of breath for a breath test and a specimen was taken providing a positive reading, but the police officer failed to comply with the instructions for use of the device in that he did not ascertain or endeavour to ascertain when the respondent had last drunk alcohol or whether he had been smoking immediately prior to the test, and he did not require the respondent to fill the bag within the period mentioned on the instructions issued with the device. When the respondent was required to provide the first specimen of breath, he was told by the arresting police officer to take a deep breath and blow into the equipment with one breath. When the respondent was given an opportunity at the police station to provide

a further specimen of breath, he was told by the police sergeant that the bag which comprised part of the breath test equipment had to be fully inflated and that he should take a deep breath. Both the police officers who stopped the respondent had read the instructions in the lid and one of the officers had read the instruction booklet. The respondent had drunk alcohol at both the Rose and Crown and the Green Man at Sandridge and it was between ten and, but less than, 20 minutes between the last drink and the time when the test was taken by the police officer. The respondent had been smoking shortly before the test was taken and had not been required to fill the bag within a certain period of time. At the police station the police sergeant took another breath test from the respondent, but failed to comply with the instructions that the bag should be filled within a specified period. The test provided a positive reading. The respondent provided a specimen of blood and the laboratory tests subsequently showed that the alcohol content of the specimen was 206 milligrammes of alcohol in 100 millilitres of blood. A certificate from the forensic science laboratory was produced by the appellant.

It was contended on behalf of the appellant that, despite the apparent failure of the police officer to comply with the instructions issued with the device "Alco-test @ 80" in taking the breath test, the arrest by the police officer was lawful, if in fact it appeared to him that the test was positive; that, despite the apparent failure of the police sergeant at the police station to comply with the instructions issued with the device, the police sergeant was entitled to require the respondent to provide a specimen of blood; and that if the specimen, once provided, proved that there was an excess of alcohol over the prescribed limit the offence was proved.

It was contended on behalf of the respondent that the Act, being a penal statute, should be strictly construed; that there was no right to arrest without warrant because: (i) the original breath test was improperly taken; (ii) the breath test was not a breath test as defined by the Act; (iii) it could not have appeared to the police officer in consequence of the test that the proportion of alcohol exceeded the prescribed limit; that if the arrest was unlawful there was no right to require the respondent to provide a specimen, and, even if a specimen was provided, if unlawfully obtained, it should not render the respondent liable for conviction under s. 1 of the Act; and that consequently a certificate of the laboratory test was not evidence for the purpose of supporting a charge under the Act. The justices dismissed the information and the prosecutor appealed.

D. H. Farquharson for the appellant.

P. J. Hunt for the respondent.

MELFORD STEVENSON, J.: This is a prosecutor's appeal by way of Case Stated from the dismissal by the justices for the city of St. Albans of an information preferred against the respondent charging that he on 10th October 1968 drove a motor vehicle having consumed alcohol in such quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provided a specimen under s. 3 of the Road Safety Act 1967, exceeded the prescribed limit at the time he provided the specimen, contrary to s. 1 (1) of the Road Safety Act, 1967.

The Case, after reciting that the respondent was driving a motor vehicle, sets out that one of two police officers who stopped the respondent required him to provide a specimen for a breath test, and a specimen was taken which gave a positive reading. But, says the Case, the officer failed to comply with the

instructions for use of the breathalyser in that he did not ascertain or endeavour to ascertain when the respondent had last drunk alcohol, or whether he had been smoking immediately prior to the test, and did not require the respondent to fill the bag within the period mentioned in the instructions issued with the device. The respondent was required to provide the first specimen of breath, and he was told by the arresting police officer to take a deep breath and blow into the equipment with one breath. Later, when he was given an opportunity at the police station to provide a further specimen of breath, he was again told by a police sergeant that the bag which comprised part of the breath test equipment had to be fully inflated and that he should take a deep breath.

The most important finding of fact contained in the Case is that the respondent had drunk alcohol at each of two public houses, and that less than 20 minutes had elapsed between the last drink and the time when the test was taken by the police officer. It was also found that the respondent had been smoking shortly before the test was taken and had not been required to fill the bag within a certain period of time. The justices concluded that the breath test had not been properly taken by the police officer.

The device known as "Alcotest @ 80" which is used for the taking of such breath tests was a device which contained or had affixed to it instructions for its use, and those instructions which are annexed to the Case Stated included the following words:

"Approved by the Secretary of State for the Home Department for the purpose of the Road Safety Act, 1967"

then the heading "Short instructions for use", the first sentence being—

"At least 20 minutes should elapse between the consumption of alcoholic drink and using the Alcotest @ 80. Smoking during or immediately prior to the test should not be permitted."

Then there follow some details about the breaking of ampoules and so on which are not immediately relevant. Then come these instructions:

"3. The measuring bag must then be fully inflated by one single breath in not less than ten and not more than twenty seconds.

"4. The test is positive if a green stain shows past the yellow ring."

Then follow words which incorporate the details in an instruction booklet identified in the short instructions "Complete details are given in instruction booklet No. 237-199".

In that booklet, the most important direction for the purpose of the present case is in these terms:

"Special points to be observed when testing: it is essential that at least 20 minutes should elapse between the drinking of alcohol and using the Alcotest @ 80. This delay should also be observed if mouth sprays have been used or aromatic drinks consumed. [There follows the explanation] Immediately after the consumption of an alcoholic drink the alcohol remaining in the mouth and in the saliva will cause a falsely high indication which bears no relation to the true blood alcohol level. After 20 minutes the distorting influence of the mouth alcohol disappears, and the blood alcohol content is thus accurately indicated by the expired air."

I have read those words in order to emphasise that, of the various instructions that are issued with the approved device, the most important in the interests of the accused, or the potential accused, is that which requires that at least 20 minutes should elapse between the taking of alcohol and the use of the testing

device. It is convenient to go straight from that instruction to the definition of "breath test" in s. 7 (1) of the Road Safety Act 1967, which is in these terms:

"... 'breath test' means a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out, by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person."

In my view, the words—

"carried out, by means of a device of a type approved for the purpose of such a test"

involve, by necessary implication, the observance of the instructions which are printed as an integral part of the device issued for the purpose of taking the breath test. If the test which it is sought to administer does not comply with those instructions, and in particular with the instruction which requires the lapse of 20 minutes between the last drink and the taking of the test, then that important condition for the protection of the potential accused is not observed and the test loses the quality of a breath test for the purpose of the definition in s. 7 (1). It is only on a breath test complying with the Act proving to be positive that the power of arrest in the officer requiring the breath test to be taken arises. So unless the later steps for which the Act provides are preceded by a test complying with the definition, those later steps are invalidated.

It seems to me undesirable to determine what a police officer seeking to carry out a breath test should say to the person from whom he desires to take a specimen of breath; it must plainly depend on the circumstances of each case. It is sufficient for the present purposes to say that the test must comply with the definition of breath test in s. 7 (1) as I have indicated. The question may of course arise of what should happen if a person invited to provide a specimen of breath asserts that he has in fact taken alcohol within the preceding 20 minutes; is the officer then justified in asking him to wait for whatever the requisite period may be before taking such a test? If he is asked so to wait and declines, it may well be that he is then exposing himself to a charge of unreasonably refusing to provide a specimen of breath for the purpose of this Act. But it is not necessary for the purpose of deciding this case to arrive at a definite determination about that.

It is sufficient for the present purpose to say that that which happened here as described in the Case Stated did not constitute a breath test for the purpose of the Act, and that the justices were therefore right in dismissing the information. It follows that this appeal must fail.

BRIDGE, J.: I agree.

LORD PARKER, C.J.: I agree and I would only add this. I am in entire agreement with what MELFORD STEVENSON, J., has said that the definition of "breath test" must incorporate the instructions; it must be not only carried out by means of the device of the type approved but in accordance with the relevant instructions for the working of that device. It is to be observed that FENTON ATKINSON, L.J., in giving the judgment of the court in *R. v. Chapman* (1), clearly took this view. He said:

"... the test was taken with an Alcotest device of the type approved by the Secretary of State, and his approval no doubt embraced the instructions of how the test is to be taken."

It follows, in my judgment, that, if it should turn out, as it did in the present case on the finding of the justices, that the breath test was taken less than 20 minutes from the last drink, then the very first condition leading up to the taking of the specimen of blood was not fulfilled. The justices in their Case appear to suggest that there was a failure on the part of the police officer to ascertain or endeavour to ascertain the position, namely, when the respondent had last drunk alcohol. I only mention that because, in my judgment, there is no duty as such on the police to make enquiries, and, as MELFORD STEVENSON, J., has said, whether they should do so or not depends on the circumstances of each case, and is a matter for them and not for this court. I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Kingsley Wood & Co.; Denis Hayes & Co.*

T.R.F.B.

HOUSE OF LORDS

(LORD GARDINER, L.C., LORD HODSON, LORD UPJOHN, LORD PEARSON AND LORD DIPLOCK)

June 3, 4, 5, July 23, 1969

NORTHERN IRELAND COMMISSIONER OF VALUATION *v.* FERMANAGH PROTESTANT BOARD OF EDUCATION

Rates—Valuation—Occupation—Master and servant—Residence by servant—

"Occupation" by master—Matters to be taken into consideration.

If it is essential to the performance of the duties of a servant that he should occupy a particular house, or, it may be, a house within a closely defined perimeter, then, it being established that this is the mutual understanding of the master and the servant, the occupation for rating and other ancillary purposes is that of the master and not of the servant. In such a case, if the necessity for occupation is not expressed in the contract between master and servant, it must be an implied term thereof in order to give efficacy to the contract. There is also the case where it is not essential for the servant to occupy a particular house or to live within a particular perimeter, but by doing so he can better perform his duties as servant to a material degree. In such a case, if there is an express term in the contract of service that he shall so reside, the occupation for rating and ancillary purposes is treated as the occupation of the master and not of the servant.

Per LORD PEARSON: The identification of the rateable occupier in cases such as this should depend on the dominant character and purpose of the occupation rather than the contractual arrangements. The contractual arrangements are important factors to be taken into account in deciding what is the dominant character and purpose of the occupation, but they could be artificially devised for securing advantages in respect of taxation or rating, and, therefore, should not be taken as affording the sole test, or necessarily the decisive test, for the identification of the rateable occupier.

Per LORD DIPLOCK: The servant's obligation to reside must be attributable to and form an integral part of the relationship of master and servant created by a contract of employment because it is only by virtue of that relationship that the master retains sufficient control of the day-to-day use of the premises to amount to occupation of them by him in law. If the covenant by the servant to reside is collateral to the main purpose of the contract of employment, even though contained in the same document, it will not result in the residence of the servant being in law "occupation" of the premises by the master. If the servant has an option whether to reside or not and the duties owed by him to his employer remain the same whether or not he exercises the option, the option is collateral to the contract of employment and the legal relationship between him and his employer resulting from his exercise of the option and his acceptance of his employer's licence to occupy the premises is also collateral.

Rates—Valuation—Exemption—Charitable purposes—"Use" of premises—Use by occupier.

By s. 2 of the Valuation of Property (Ireland) Act, 1854, the Commissioner of Valuation is required to distinguish in the valuation list all hereditaments and tenements "used for charitable purposes" and the section provides that "all such hereditaments and tenements . . . shall, so long as they shall continue to be . . . used for the purposes aforesaid" be deemed exempt from rating. [For the corresponding provision in England, see s. 40 (1) of the General Rate Act, 1967.]

The relevant use of the hereditament for determining whether a hereditament is exempted from rates within s. 2 above is that of the occupier and the relevant purposes for which the hereditament is used are those of the occupier alone.

APPEALS by the Commissioner of Valuation for Northern Ireland against orders of the Court of Appeal of Northern Ireland relating to the rateability of seven houses occupied by six assistant masters and the vice-principal of Portora Royal School, Fermanagh, all those premises being within the precincts of the school.

Portora Royal School, in Northern Ireland, consisted of school buildings and also within the grounds of the school the seven houses mentioned above. Six of the houses were occupied by assistant masters at the school and one was the residence of the vice-principal. Each house was occupied rent free by the master, each of whom had exclusive possession under a licence granted by the Fermanagh Protestant Board of Education, the governors of the school, which provided that the master should occupy the house for the better performance of his duties as a servant of the board and not as tenant and should not create any tenancy or give himself any interest in the house. No master was obliged to live in one of the houses as part of his duties. If a master wished to have one of the houses he would apply to the headmaster who would make a recommendation to the board. If the master were selected he was bound under the terms of the licence to occupy the house personally with his family. A licence was determinable by three months notice.

The Commissioner of Valuation for Northern Ireland decided that the houses occupied by the assistant masters and the vice-principal were not entitled to exemption from rating as being exclusively used for charitable purposes. The Lands Tribunal for Northern Ireland allowed an appeal against that decision by the board of education, and that decision was affirmed by the Court of Appeal of Northern Ireland. From the last-mentioned decision the Commissioner appealed to the House of Lords.

F. A. Reid and R. T. Rowland for the appellant.
MacDermott, Q.C., and R. D. Carswell.

All the counsel were members of the Northern Ireland Bar.

Their Lordships took time for consideration.

July 23, 1969. The following opinions were delivered.

LORD GARDINER, L.C.: I have had the advantage of reading the speeches of my noble and learned friends, LORD UPJOHN and LORD DIPLOCK, and I agree with them in allowing the appeal in respect of the six houses in Castle Lane and dismissing the appeal in respect of "Stepaside".

LORD HODSON: I have had the advantage of reading the speeches of my noble and learned friends, LORD UPJOHN and LORD DIPLOCK, and I agree with them in allowing the appeal in respect of the six houses in Castle Lane and dismissing the appeal in respect of "Stepaside".

LORD UPJOHN: The facts in this case are so fully and clearly set out in the decision dated 10th February 1967, by the Lands Tribunal for Northern Ireland that I shall make no attempt to recapitulate them. This appeal is concerned with rating, which is purely a creature of statute, but it must be noted that the relevant statutes for Northern Ireland, Scotland and then England and Wales, differ in many material respects, so the decided cases bearing on the interpretation of one set of statutory provisions can only be applied with much caution to another. But all relevant rating legislation of these countries has one basic method of rating in common—it is the occupier of the rated hereditament who is assessed to and liable for payment of the rates. This case is in the end concerned only with the question: Who for the purposes of the relevant statutes is the occupier?—so some of the authorities decided in relation to the rating statutes of other countries may be consulted, although still with caution.

There are two separate questions in this appeal: (a) six houses occupied by masters in Castle Lane within the precincts of the school; (b) the vice-principal's house "Stepaside" similarly within those precincts. I propose to consider first the case of the six houses, and there is no difference between any of them.

It is important to note that, although each of the six houses is within the general perimeter of the school buildings, they are not treated as part of a general hereditament comprising those buildings but each is separately rated as a separate hereditament. Each of those houses is occupied by a master with his family for the purposes of his beneficial occupation. Each occupant is properly described, not only colloquially but for many legal purposes, as the occupier of the hereditament in question. Thus, it cannot be doubted that each master is in occupation for ordinary purposes, that is to say, he can sue for trespass to his house and so on. He has the exclusive possession of those premises. No part of each of those houses is used in any ordinary sense for school purposes; each house is in the sole and beneficial occupation of the master. But although the master of each hereditament is for many purposes described as the occupier of the hereditament, it does not necessarily follow that for the purposes of rating he is properly entered as the occupier in the rating book. It is quite clear that, as the result of judge-made authority, the occupier of the premises may not be the occupier for the purposes of rating, taxation or voting. This has recently been discussed in your Lordships' House in *Glasgow City Corp'n. v. Johnstone* (1), a case dealing with the statutes applicable to the Scottish rating legislation but which may, in my opinion, be safely applied to the relevant issue in this case. The earlier history was examined by LORD REID in his speech and I do not propose to repeat it. It seems to me that the law on this matter really stems from *Dobson v. Jones* (2), where TINDAL, C.J., laid down the basic principle in these terms:

"In delivering our opinion upon [*Hughes v. Chatham Overseers* (3)] . . . we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs, ought to be decided; and we drew the distinction between those cases where officers or servants in the employment of government are permitted to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are required to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion, we declared our opinion to be that those officers or servants who fell

(1) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

(2) (1844), 5 Man. & G. 112.

(3) 8 J.P. 89; [1843-60] All E.R. Rep. 470.

within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allowed to them, have had an additional allowance for lodging-money; whilst at the same time, we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant."

So the occupier being required to reside there did not have a vote. In the *Glasgow Corpn.* case (1) it was argued, in reliance on some observations in the judgment of MELLOR, J., in *Smith v. Seghill Overseers* (2), another rating case, that the mere requirement (presumably contractual) to reside is insufficient to make the occupation that of the master (the employer), but it must in addition be shown that residence was necessary for the purposes of employment in order to find that the occupancy should be that of the master. This was dealt with and disposed of in the speech of LORD HODSON in the *Glasgow City Corpn.* case. The result of the authorities on this question of occupation seems to me quite clearly to be as follows. First, if it is essential to the performance of the duties of the occupying servant that he should occupy the particular house, or it may be a house within a closely defined perimeter, then, it being established that this is the mutual understanding of the master and the servant, the occupation for rating and other ancillary purposes is that of the master and not of the servant. In truth and in fact, in such a case, if the necessity for occupation is not expressed in the contract between master and servant it must, of course, be an implied term thereof in order to give efficacy to the contract between the master and the servant. This is obvious, although it seems never to have been pointed out before, perhaps because it is so obvious. Secondly, there is the case where it is not essential for the servant to occupy a particular house or to live within a particular perimeter, but by doing so he can better perform his duties as servant to a material degree: then, in such case, if there is an express term in the contract between master and servant that he shall so reside, the occupation for rating and ancillary purposes is treated as the occupation of the master and not of the servant. All this seems to me clearly to flow from the speech of LORD HODSON, although perhaps I have expressed it a little differently.

That, then, is the law which seems to me to be applicable to this case, but before turning to the facts as found by the Lands Tribunal I think it will be convenient for me to deal with the part of the judgment of LORD MACDERMOTT, C.J., in the Court of Appeal where he deals with the effect of the licence granted by the board to occupy one of the six houses. As the terms of the licence on which each master was so entitled to occupy the house are set out very fully in the decision of the Lands Tribunal, I do not propose to repeat it in any detail but only to summarise briefly its provisions. The board granted to the master a licence to occupy the dwelling-house and, for the better performance of his duties, the master should occupy and reside in the premises and such occupation and residence should be as a servant of the board and not as tenant and should not create any tenancy therein or give the master any estate or interest therein. Then, the master was entitled to occupy the premises free of payment to the board and the board would keep the premises in repair. And then it was provided that either party might at

(1) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

(2) (1875), 40 J.P. 228; [1874-80] All E.R. 373; L.R. 10 Q.B. 422.

any time determine the licence by giving to the other three months' notice in writing to that effect expiring at any time. As the decision made clear, no master was under any obligation to reside in any of these six houses as part of his duties. The practice was that if a master was so minded he would apply and the headmaster, having considered his application, would make a recommendation to the board. This recommendation would be based partly on the personal circumstances of the applicant but would give priority to those masters who were thought to be likely to be active participants in the school activities outside the classrooms, and residence in such houses, close to the main school, enabled masters to take a larger part in those activities with less loss of time than if they had to live further away. No doubt, too, masters who were selected to occupy one of these six houses were expected over the weekend and in the afternoons to perform roster duties and so forth. LORD MACDERMOTT, C.J., in the course of his judgment, reached the conclusion that the provisions of the licence worked a modification of the original contract of employment while it was operative and so amounted to an express contract for the purposes of the doctrine, which I have already stated, that the master was bound to reside in the house in question while the licence remained in force. My Lords, I am, I regret, unable to agree with LORD MACDERMOTT, C.J., in this view. No master was required to live in any one of these houses. If he was so minded he could apply to occupy one of them and, if selected, he was of course no doubt bound to occupy that house personally with his family. He could not let it, or part with possession of it, in any way. But he could at any time if he was so minded, or per contra if the school authorities were so minded, leave or be called on to leave the premises on giving three months' notice. The licence called on him to perform no greater duties than he would be called on to do if he remained in some residence outside the precincts of the school although, naturally, he was expected to undertake certain duties. This was not in any way a matter of contract but a matter of understanding between the governors of a great school and the dedicated souls who form the masters. But I find it quite impossible to spell out of the terms of the licence any term affecting the terms of employment of the master who could leave and go back to some residence some distance away at any time that he pleased on giving three months' notice, without affecting in any way his duties or his remuneration except that, if he left, he would obtain the living-out allowance which naturally he gave up when occupying the house. Putting it shortly, it seems to me clear that the terms of the licence imposed on him only the terms on which he was permitted to occupy the premises and did not affect in any way his terms of employment with the board.

I turn, then, to consider the findings of the tribunal in relation to the terms of employment. First, it is quite clear, the licence to occupy the house being out of the way, that there is no express term requiring the master to occupy one of the houses; he could leave it at any time on giving due notice. Secondly, was it essential for the performance of his duties that he should occupy one of those houses? It seems to me quite clearly that it was not, if only for the simple reason that he could leave at any time that he chose, reside outside the precincts of the school and yet continue as a master in the school on the same terms as formerly, save that he received a living-out allowance. I have already pointed out that one of the reasons that the master was invited to apply for one of these houses was to enable him to take part in school activities with less lost time. Then the decision found this:

"The allotment of accommodation there was not directly connected with the terms of employment, but was a privilege given to selected masters. The basis of such allotment was that the school might have a number of young,

active, junior masters close to the hub of school activities 'for the better performance of their duties'."

Later, the Lands Tribunal posed the question quite correctly; they said:

"The duties of each master have been considered separately, and there is no doubt that each can better perform his duties by reason of living in Castle Lane, and it is no doubt a great advantage to the school to have an increased complement of masters living nearby who take part in the varied school activities after classroom hours, but can it be said that residence in the Castle Lane houses is essential for performance of their respective duties?"

The tribunal considered this matter carefully and came to this conclusion, when they said:

"Put shortly, the residence of each of the masters in Castle Lane served the governors in a degree that can be said to be essential to the educational activities of the school."

But with all respect to that decision, that does not answer the question. It may well be an advantage to the school to have six masters living within the precincts, masters no doubt carefully selected and largely with a view to their extra-mural activities with the boys. But it does not seem to me that it can possibly be said that it was essential to the service of a given master that he should occupy a particular house or one of six particular houses for the performance of his duties when he could leave at any time, and no doubt some other keen young master would be happy to take his place. In my opinion it was not essential to the performance of his duties and so understood between master and servant that it was an implied term of his employment that the master should live there. It seems to me, therefore, that the Lands Tribunal was wrong in coming to the conclusion that the master's occupation of one of these houses was the occupation of the school, and I would allow the appeal against that part of the decision.

I turn, then, to the case of the vice-principal's house "Stepaside," also a separately rated hereditament. The vice-principal occupies this house under the terms of a licence similar to those of the six houses I have just considered. But for the reasons there given I am unable to take the view that this licence in any way affected the terms of his employment. The licence was directed only to the terms of his occupation. It follows that there was no express term of his employment that he was bound to reside in this house, and the sole question is whether it is possible to infer an implied term because it was understood between master and servant that residence in a house such as "Stepaside" close to the main school buildings was essential for the proper discharge of his duties. The Lands Tribunal dealt with this matter at length and with the greatest care. The Lands Tribunal said this:

"The vice-principal was required to live in Stepaside when he became a housemaster in 1957, and on appointment in 1960 as vice-principal he continued to do so. There was thus no express term obliging him to reside there on appointment as vice-principal, but in the opinion of the tribunal the case falls plainly within the second category by reason of his duties."

The second category there mentioned is the first category in my enunciation of the applicable principles.

"It is difficult to contemplate a school of this character not having a resident headmaster for its main school, and parents would expect to find the headmaster or, in his absence, his deputy available at all times at the school. In addition, the vice-principal's duties as a staff co-ordinator require him to

be on hand at all times, and it is not too much to say that the vice-principal's residence close to the main school is an essential feature in the working of the school."

There was ample evidence on which the tribunal could come to that conclusion and, in my opinion, it necessarily follows that the occupation of "Stepaside" by the vice-principal is the occupation for the purposes of the school. My Lords, it is not seriously contended that occupation for the purposes of the school is otherwise than for exclusively charitable purposes and, in my opinion, the school being a charitable organisation that clearly is right. The mere fact that the house was occupied by a member of the staff and not by the boys themselves can make no difference in principle. In either case the occupation was exclusively for the purposes of the school. The case of the *Northern Ireland Valuation Comr. v. Fermanagh County Hospital Committee of Management* (1) was clearly wrongly decided and was based to some extent on a misunderstanding of *Moon (Lambeth Revenue Officer) v. London County Council* (2). It must in any event be taken to have been overruled by the *Glasgow City Corp'n.* case (3). Accordingly, the residence "Stepaside" qualifies for exemption within the relevant rating statute. Accordingly, I would affirm the decision of the Lands Tribunal in respect of "Stepaside", but would reverse the tribunal in respect of the six houses. To that extent I would, therefore, allow this appeal.

LORD PEARSON: I have had the advantage of reading the opinions prepared by my noble and learned friends, LORD UPJOHN and LORD DIPLOCK. I agree with their conclusions and also agree with their reasons subject to a reservation as to the formulation of the principle which is being applied. It seems to me that the identification of the rateable occupier in cases such as this should depend on the dominant character and purpose of the occupation rather than the contractual arrangements. More weight should be ascribed to the practical realities than to the conveyancing. Of course the contractual arrangements are an important factor to be taken into account in deciding what is the dominant character and purpose of the occupation, but they could be artificially devised for securing advantages in respect of taxation or rating, and therefore should not be taken as affording the sole test, or necessarily in all cases the decisive test, for the identification of the rateable occupier.

In this case it seems to me clear, when all the relevant factors are considered, that the dominant character and purpose of the occupation of each of the six houses in Castle Lane is as a residence for one of the assistant masters and his family. He has the exclusive possession and beneficial enjoyment of the house. The house is directly and immediately used for his domestic purposes and not for school purposes. The house is for him and his family to live in, not for the teaching or recreation of the boys of the school. No doubt the provision of these dwelling-houses for some of the assistant masters has advantages for the school authorities. It probably assists them to obtain and retain the services of good assistant masters, who are glad to have residences provided for them in a convenient situation. Also the presence of some of the assistant masters in houses within the school grounds makes them more readily available for giving voluntary help with out-of-school activities. But the reality of the situation still is that the selected assistant masters are allowed to live in these houses as a privilege. They do not have to live there; if one of them wished to move to some other house further away he would be permitted to do so and his duties would remain the same. So long as

(1) [1947] N.I. 125.

(2) 95 J.P. 64; [1930] All E.R. Rep. 63; [1931] A.C. 151.

(3) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

the practical realities of the position remained the same, I do not think that the rateable occupation could be changed merely by devising a form of contract of service which contained an express term purporting to require the assistant master to live in the house for the better performance of his duties. On the other hand, the vice-principal's house, called "Stepaside", is used and has to be used by him to a substantial extent for school purposes and a conclusion that the school authorities have the rateable occupation is justified.

Accordingly, I agree with my noble and learned friends in allowing the appeal in respect of the six houses in Castle Lane and dismissing the appeal in respect of "Stepaside".

LORD DIPLOCK: These two appeals relate to the valuation for rating of dwelling-houses in which members of the staff of Portora Royal School reside with their families. Six of these houses, situate in Castle Lane, are the residences of assistant masters at the school; the other, "Stepaside", is the residence of the vice-principal of the school. The appeals are on Cases Stated by the Lands Tribunal. Many of the relevant facts are common to both appeals. They have accordingly been heard together by the Lands Tribunal, the Court of Appeal in Northern Ireland and your Lordships' House. The right of appeal from a decision of the Lands Tribunal is on a point of law only. Your Lordships are accordingly bound by the findings of fact of the Lands Tribunal. These are set out in considerable detail in the decision of the Lands Tribunal annexed to the Cases. The decision, which was on appeal from the Commissioner of Valuation, takes the form of a statement of the facts admitted or proved in evidence before the Lands Tribunal, followed by a summary of the submissions of counsel for the respective parties, and concluding with the "decision" of the Lands Tribunal as to the legal consequences of the facts found. This part of the decision includes some repetition, although in somewhat different language, of facts previously found and, in the case of the vice-principal's house at any rate, may throw some light on what was meant by expressions used in the earlier findings of fact. The issue in these appeals is whether in the one case the residences of the six assistant masters and in the other case the residence of the vice-principal, are exempt from rates and the point of law on which the determination of this issue depends is whether or not on the facts found by the Lands Tribunal these dwelling-houses were in the year 1965-66 "used for charitable purposes" within the meaning of s. 2 of the Valuation of Rateable Property (Ireland) Act 1854, an expression which, by virtue of s. 16 of the Valuation (Ireland) Act, 1852, means "used exclusively for charitable purposes".

Portora Royal School is an educational charity of which the Fermanagh Protestant Board of Education is the corporate trustee. The beneficial interest in fee simple in the dwelling-houses is vested in the board. But the six houses in which the assistant masters reside are let under a building lease to the Portora Housing Society, Ltd., which contains a covenant that they shall be—

"used and occupied only by members of the teaching staff at Portora Royal School and only for so long as they shall be active paid members of the said teaching staff."

They are sublet by the housing association to the board on a sub-tenancy from year to year. None of the contracts of employment of the members of the teaching staff who reside in the houses contains any express term requiring them to do so; but each of them has been granted by the board a licence to occupy the house in which he resides terminable on three months' notice by either party. These licences are in identical terms which it will be necessary to examine more closely later. The use which is made of the houses by the assistant masters is as a private

residence for themselves and their families. No part of their activities in relation to the running of the school are carried on there. In this respect the use made of them does not differ from the use made by other assistant masters who own or lease from third parties their own residences in the town of Enniskillen. The same is true of the house in which the vice-principal resides except that he occasionally does carry on there some activities in relation to the running of the school such as interviewing parents, visitors and members of the staff. About half the pupils at the school are boarders and much of its activities, in which day-boys are also encouraged to join, are carried on outside formal teaching hours in the playing fields, the boarding-houses and other parts of the school premises. The members of the teaching staff are required to supervise and participate in these extra-curricular activities but the very nature of these activities makes it impossible to specify in the contracts of employment of the masters the times to be devoted to such supervision or participation or the form which it is to take, except in relation to such duties as acting as duty master, etc.

It is obviously a convenience to masters with extra-curricular duties of these kinds to live close to the place where they are carried on and an encouragement to them to do more than would be sufficient to satisfy the terms of their contracts of employment and more than they would have done if they had to travel a longer distance from their homes. It was for this reason that the board provided houses for some of the staff in premises in which the board had an interest in possession. They considered, with justification, that this would improve the education provided for the pupils at the school and so promote the objects of the charitable trust of which they were trustees.

In any ordinary sense of the words each of these houses was both "used" and "occupied" by the master who resided in it, although in a more indirect sense they might also be said to be used by the board for providing residences for the members of their staff. It is common ground that the use of a house by a schoolmaster for the purposes of a private residence for himself and his family is not a use for charitable purposes. Unless the purposes for which the members of the staff who resided in the houses with which these appeals are concerned can be ignored none of the houses was "used exclusively for charitable purposes". Can those purposes be ignored? This calls for further analysis of the words "hereditament used exclusively for charitable purposes" in its context, which is that of a rating statute.

To say that any human action such as using a house is for a "purpose" postulates the existence of a particular state of mind on the part of whoever does it—and the enquiry expressed in the passive voice whether a hereditament is used for a particular purpose involves as a first step identifying the person or persons using the hereditament whose purpose in doing so is relevant. In a context other than that of a rating statute the expression "used" might be apt to describe concurrent activities of a number of persons undertaken on or in relation to the hereditament for different purposes and in the instant appeals to embrace not only the direct use of the houses by the members of the staff residing in them but also the indirect use of them by the board to provide residential accommodation for the staff of the school. But, as already pointed out, to construe "used" in this wide sense would be fatal to the commissioner's case. In my view, however, your Lordships are constrained by authority which I would not be prepared to overrule to hold that the only relevant use is that of the person who in English law is in "occupation" of the hereditament. The purposes for which he uses it are the only relevant purposes in determining whether or not the hereditament qualifies for exemption from rates.

Under the Northern Irish legislation, as under the English, the liability to pay rates is imposed on the occupier. Parliament cannot have intended to impose separate and independent liabilities to pay the rate for the same hereditament on more than one person except where their legal right of occupation is a joint right, as in the case of joint tenants. In English law, therefore, although there may be a joint occupation of a single hereditament there cannot be rateable occupation by more than one occupier whose use of the premises is made under separate and several legal (or equitable) rights. The English rating legislation contains no definition of "occupier"; but in s. 84 of the Poor Relief (Ireland) Act, 1836, that term is including "every person in the immediate use or enjoyment of any hereditament". It was, however, held by your Lordships' House in *Byrne v. City of Dublin Steam Packet Co.* (1) that

"the immediate use or enjoyment which is rateable in Ireland must be similar so far as its legal character is concerned to the occupation which would be rateable in England."

This definition, in my view, also throws light on the meaning of the word "used" in s. 2 of the Valuation of Property (Ireland) Act 1854, which provides for exemption from liability to pay rates. The use of the hereditament which is thereby referred to is its use by the person who is in rateable "occupation" of the hereditament. It is neither reasonable nor just that his liability should depend on the activities in relation to the hereditament undertaken by any other person acting under a separate legal (or equitable) right which as occupier he has no power to control. The relevant "use" of the hereditament for determining whether a hereditament is exempted from rates is that of the occupier and the relevant "purposes for which the hereditament is used" are those of the occupier alone.

I therefore agree with the Lands Tribunal and with LORD MACDERMOTT, C.J., and McVEIGH, L.J., that the first and crucial question in each of these appeals is: Who in law was in occupation of the dwelling-house sought to be rated? The answer to this question is, in my view, determinative of the respective appeals. If the member of the staff who resided in the house with his family was in occupation of it, the relevant purposes for which *he* "used" it were not charitable purposes. If, on the other hand, the board were in occupation of the dwelling-house, the purposes for which *they* "used" it were for the furtherance of the objects of their charitable trust by the provision of teaching and training for the beneficiaries of the trust, the pupils at Portora Royal School, through the members of their staff whom they permitted to reside in the dwelling-house. The fact that the person permitted to reside in a dwelling-house which is in law "occupied" by charitable trustees is not himself an object of the charitable trust and derives a material benefit from doing so, does not prevent the occupation of the house by the board being exclusively for charitable purposes. This is implicit in the decision of your Lordships' House in *Glasgow City Corp'n. v. Johnstone* (2) which, although decided under a different statute, involved not only the question mainly debated in the speeches as to who was in "occupation" of a residence provided for their servant by charitable trustees but also the question whether the dwelling-house provided for him was "wholly or mainly used for charitable purposes". The reasoning of an earlier decision of the Court of Appeal in Northern Ireland under the Northern Irish legislation in *Northern Ireland Valuation Comr. v. Fermanagh County Hospital Committee of Management* (3) to the contrary effect is in conflict with your Lordships' decision in the *Glasgow City Corp'n.*'s case (2). Despite

(1) (1883), L.R. (I.) 220.

(2) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

(3) [1947] N.I. 125.

the doubts expressed by CURRAN, L.J., in the present appeal the *Fermanagh Hospital* case must, in my view, be treated as overruled by the *Glasgow City Corp'n.'s* case. The majority of the Court of Appeal in Northern Ireland (LORD MACDERMOTT, C.J., and McVEIGH, L.J.) in *Belfast Association for Employment of Industrial Blind v. Northern Ireland Valuation Comr.* (1) were of opinion that the *Fermanagh Hospital* case should be treated as overruled, though LORD MACDERMOTT, C.J., did so in what was a dissenting judgment. It has not been contended by counsel for either party in the instant appeals that the *Fermanagh Hospital* case is still good law in Northern Ireland; and it is desirable that any doubts on this matter should be set at rest. These appeals, therefore, turn on the question whether the board or the resident member of the staff was in "occupation" of the dwelling-house in which he resided. On this question also the *Glasgow City Corp'n.'s* case (2) is very much in point.

In the ordinary meaning of the word a person is in "occupation" of premises if he in fact uses them and is able to control the day-to-day use of them by other persons. In both of the present appeals there is no doubt that, in the ordinary meaning of the word, the member of the staff who resided there was in occupation of the dwelling-house which he used as a home for himself and his family. The use which he made of it and the control which he exercised over its day-to-day use by other persons was no different from the use and control which he would have had over a dwelling-house owned by him or leased from some other landlord in the town of Enniskillen. The licence under which he resided was expressed as a licence "to occupy the dwelling-house"; it forbade him to part with the "occupation or control" of the premises or any part; it reserved only a qualified right of the board and their agents to enter the premises for such purposes as inspection and repair.

But there are many acts which in law can be done vicariously. Although done physically through the instrumentality of another person they are regarded in law as the acts of him who authorised or directed them to be done and, unless tortious, are not regarded as the acts of the actual physical doer. Whether acts are to be ascribed in law to a person other than the physical doer depends on the legal relationship between the person who does the physical acts and the person to whom the law imputes them. Acts which together constitute the occupation of premises can be done vicariously but only if done pursuant to a legal relationship which confers on the person to whom the acts are to be imputed a right not only to require the actual doer to do the acts but to control the way in which he does them. This right of control of the way in which acts are done is the distinctive legal characteristic of the relationship of master and servant where the acts done by the servant constitute the performance by the servant of duties imposed on him by his contract of service. In the ordinary case the concept of vicarious "occupation" of a hereditament presents no difficulties where this relationship exists. For instance, in many cases the only use which an employer can make of premises in which he has an interest in possession is to accommodate his servants while they are performing their duties in carrying on business or other activities on his behalf. Because the relationship of master and servant entitles the master to control the way in which his servants perform their duties on the premises, the power of control of the day-to-day use of the premises which is the legal characteristic of "occupation" of premises remains in the master. But the case in which a servant resides in a separate dwelling-house provided by his employer may give rise to difficulties. The mere fact that there exists a contract of employment

(1) [1968] N.I. 21.

(2) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

between the person who has an interest in possession of the premises and the person who resides and has the de facto use and control of them does not make the occupation that of the employer. As long ago as 1844 the distinction was drawn by TINDAL, C.J., in *Dobson v. Jones* (1):

"... between those cases where servants in the employment of government are *permitted* to occupy a house belonging to the government as part remuneration for the services to be performed and those in which the places of residence are selected by the government, and the servants are *required* to occupy them, with a view to the more efficient performance of the duties or services imposed on them."

In the former case the occupation was that of the servant; in the latter that of the master. This passage was cited with approval by LORD REID in the *Glasgow City Corpn.'s* case (2) and I understand his speech as accepting the requirement that in order for the residence of the servant on premises in which his employer has an interest in possession to constitute in law "occupation" of the premises by the master it must be a term of the contract of employment, either express or implied, that one of the duties he is required to perform as such servant is to reside on the premises assigned to him by his employer. In other words, the servant's residence on the premises must constitute a part of the consideration moving from him to his employer for which he is paid his salary or wages. I think, with respect, that LORD MACDERMOTT, C.J., and McVEIGH, L.J., were in error in supposing that my noble and learned friend, LORD HODSON, was intending to add an additional category of vicarious occupation by the servant in that part of his speech in the *Glasgow City Corpn.'s* case (2) where he referred to the case where the servant's residence in his employer's premises was "necessary" for the efficient and proper discharge of his duties to his employer. It had been submitted for the corporation that even where there was an *express* term in the contract of employment obliging the servant to reside, his residence could not constitute "occupation" by the employer unless it could also be shown that it was *in fact* necessary for him to do so in the sense that it would not be possible for him to perform his other duties under his contract of employment if he resided elsewhere. In rejecting this submission LORD HODSON dealt also with the point that if necessity to reside in this strict sense could be shown there would be an obligation to do so as an *implied* term of the contract of employment even in the absence of an express term to that effect. The decision of the Divisional Court in *Hirst v. Sargent* (3) is, in my view, an instance of such an implied term.

But the servant's obligation to reside must be attributable to and form an integral part of the relationship of master and servant created by a contract of employment because it is only by virtue of that relationship that the master retains sufficient control of the day-to-day use of the premises to amount to "occupation" of them by him in law. In all the previous cases which have been cited the express term requiring the servant to reside in his employer's premises has been contained in the same agreement as the contract of service itself. But even this is not decisive. Like any other contract a contract of service may contain covenants collateral to its main purpose of imposing duties on the servant which are to be performed by him on his master's behalf and subject to his master's control. If the covenant by the servant to reside is collateral to the main purpose of the contract of employment, even though contained in the same document, it will not result in the residence of the servant being in law "occupation" of

(1) (1844), 5 Man. & G. 112.

(2) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

(3) 65 L.G.R. 127.

the premises by the master. It was this kind of collateral obligation to reside that, as I understand their speeches, was intended to be excluded by LORD REID when he said that the employers must show

"... that their servant is bound to reside there, and that his residing there is of material assistance to them in the carrying out of their activities ..."

and by LORD HODSON when he referred to the servant's being

"... genuinely obliged by his master for the purposes of his master's business ... to reside in the house for the performance of his services ..."

The same concept is, I think, implicit in the contrast drawn by TINDAL, C.J., in *Dobson v. Jones* (1) between a servant's being *permitted* to reside and his being *required* to do so with a view to the more efficient performance of the duties imposed on him.

A fortiori if the servant has an option whether to reside or not and the duties owed by him to his employer under his contract of employment remain the same whether or not he exercises that option, the option is collateral to the contract of employment and the legal relationship between him and his employer resulting from his exercise of the option and his acceptance of his employer's licence to occupy the premises is also collateral. It does not cease to be collateral because it is made a condition of the licence that so long as it subsists he shall actually reside on the premises.

In such a case the obligation, as well as the right, of the servant to reside arises, not out of the relationship of master and servant, but out of that of licensor and licensee. Although a licence to make use of premises for some purposes may be so qualified as to reserve to the licensor sufficient control of their day-to-day use as to amount to continued occupation by the licensor (see *Byrne v. City of Dublin Steam Packet Co.* (2)), a licence to occupy premises as a "dwelling-house" prima facie transfers the "occupation" of the dwelling-house to the licensee, for it is inconsistent with the reservation of the day-to-day control of its use by the licensor.

The only exception is where the person using the premises as a dwelling-house does so as a duty which he has contracted to perform as a servant under his contract of employment. From the point of view of practical reality this is somewhat anomalous for it is unlikely that either master or servant contemplate that the master will exercise any day-to-day control of the actual use made by the servant of the premises so long as it does not fall outside the general description of use "as a dwelling-house". But it is established by authority culminating in the *Glasgow City Corpn.'s* case (3) that the general right of control by the master of the way in which the servant shall perform his duties as a servant which is implicit in the legal relationship of master and servant is sufficient in law to retain in the master the "occupation" even of a dwelling-house if his servant's use of it as such is a duty which he has undertaken to perform under his contract of service. This anomaly is not, however, to be extended beyond the strict limits of the relationship of master and servant.

In none of the cases under appeal was there any *express* term in the contract of employment of the member of the staff of the school that he should reside in the dwelling-house which he was licensed by the board to occupy. The terms on which he should occupy the dwelling-house appear only in the licence to occupy. This was expressed to be terminable by either party on three months' notice. There was nothing on the face of it to suggest that it could not be determined

(1) (1844), 5 Man. & G. 112.

(2) (1883), L.R. (1.) 220.

(3) 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

except on termination of the contract of employment of the licensee. There was an express provision that it should come to an end if the contract of employment was determined although in some circumstances it might continue for a short time thereafter. An express obligation on the master to reside in the dwelling-house and not to reside elsewhere except during school holidays was imposed by the licence and was accordingly co-terminous with the licence. The occupation and residence of the master was expressed to be for the better performance of his duties and it was expressly provided that

"... such occupation and residence shall be as a servant of the [board] and not as a tenant and shall not create any tenancy thereof or give the master any estate or interest therein ..."

The licence to occupy the dwelling-house was no doubt granted to the licensee *because* he was a servant, but this is not enough to make his occupation that of his employer. The express obligation to reside is imposed on him only by the licence. It is part of the consideration moving from him to his employer for the grant of the licence and arises directly from the relationship of licensor and licensee not that of master and servant. It is not part of the consideration moving from the master to the board for the salary paid to him for the services which he renders under his separate contract of employment. The express covenant to reside is accordingly collateral to and not part of the licensee's contract of service and, in my view, the board can only succeed in their claim for exemption from rates on the dwelling-house by showing that on the facts found by the Lands Tribunal a term is to be implied in the contract of service of each licensee that he shall continue to reside in the dwelling-house so long as his service under that contract continues. In view of the express term in the licence itself that either party may terminate it on three months' notice the implied term in the contract of service would have to take the form of an implied covenant by the licensee that he would not exercise his power to give notice terminating the licence so long as he continued in the service of the board under that contract.

Whether a particular term is to be implied in a contract because of the existence of surrounding facts is an inference of law to be drawn from the facts found to exist. Since this inference depends on the terms being necessary in order to give efficacy to the contract the view of the finder of facts as to such necessity is entitled to weight, but it is not binding on an appellate court whose jurisdiction is limited to correcting errors of law, if in that court's view the primary facts do not justify such a finding. Your Lordships are accordingly entitled to review the conclusions of the Lands Tribunal on this matter.

The surrounding facts relating to residence by the vice-principal in "Stepaside" are materially different from those relating to the residence by the assistant masters in their respective dwelling-houses in Castle Lane. The licence to occupy "Stepaside" was granted to the vice-principal in 1957 when he was appointed a housemaster under a contract of service which, as I understand the Lands Tribunal's findings, contained an express term obliging him to reside there as part of his duties under his contract of service. When he ceased to be a housemaster on appointment as vice-principal he continued to reside there under the licence but his new contract of service omitted an express term requiring him to do so. It is significant, however, that the contract of service of his successor, a bachelor, who was appointed after the relevant rating year did contain an express term requiring him to live in the main building of the school.

The duties of the vice-principal are described in detail in the findings of fact of the Lands Tribunal. Broadly speaking, he acts as deputy and general staff officer to the headmaster and the significant finding is that "he must be available

within ready call " which I understand to mean at all times for, from the nature of his duties as described, they may fall to be performed at any time of the day during the school term or the school holidays and are not confined to any regular hours. In that part of the Case Stated which contains the "decision" the Lands Tribunal repeats some of these facts and records the conclusion that "the vice-principal's residence close to the main school is an essential feature in the working of the school".

Although the opinion of the Lands Tribunal was, I think, based on an imperfect understanding of LORD HODSON's speech in the *Glasgow City Corpn.'s* case (1) as its mind was not specifically directed to the question whether it was an implied term of his contract of service that the vice-principal should be obliged to continue to live at "Stepaside", the facts found justify that inference of law. I would therefore uphold the decision of the Lands Tribunal as respects the vice-principal's house and dismiss the appeal relating to "Stepaside".

Each of the six houses occupied by the assistant masters was separately rated. The occupation of each must accordingly be considered separately. The rival candidates as occupiers are in each case the board and the individual assistant master who actually resided in the house, not the board and the six masters collectively. Each of the assistant masters was already serving as such under a previously existing contract of service and residing elsewhere at the time at which a licence to occupy a house in Castle Lane was granted to him. Each of them applied for his house when it fell vacant. The allotment of it to him was described in the findings of fact of the Lands Tribunal, and again its decision described the allotment as a "privilege". It was made by the board on considerations not wholly related to the efficient running of the school but which also took into account the personal circumstances affecting each applicant. There is an important finding that

"If any master had after settling in one of the Castle Lane houses desired to move out into private accommodation the governors would have permitted him to do so."

There is no suggestion in the findings of fact that the master's duties under his contract of service were in any way changed by the grant of a licence to him to occupy a house in Castle Lane, or that he thereby became on call for duty at any time when he would not have been if he had resided elsewhere. No doubt there was an expectation that his residence there would encourage him to continue voluntarily to participate in the extra-curricular activities to a greater extent than he was obliged to do so by his contract of service. But this was a matter of expectation, not of contractual duty, and in a passage contained in the "decision" of the Lands Tribunal which can only be a finding of fact:

"Each of them obtained the privilege of doing so [i.e., residing in the house] as the result of an application made when already performing all the duties of their respective appointments while living elsewhere."

On these facts it is, in my view, impossible as a matter of law to draw the inference that it was an implied term of any of the assistant master's contracts of employment after they had taken up residence in Castle Lane that he should continue to reside there. The Lands Tribunal in its decision said:

"It may seem decisive to say that any one of these masters could play his part while living elsewhere and that residence in a Castle Lane house is not essential to his duty."

I agree with CURRAN, L.J., that it is decisive, and that the occupier of each of these houses is the assistant master who occupies it under the licence. The purposes for which it is used are accordingly not charitable purposes.

As I understand the Lands Tribunal's decision it felt able to reach the contrary conclusion by considering the advantage to the board of having a proportion of their staff, consisting of six masters collectively, residing in close proximity to the school premises, instead of considering the legal relationship existing between the board and individual master residing in each hereditament. It may well be, as the Lands Tribunal thought, "that it can be said to be essential to the educational activities of the school" to have a proportion of the staff residing close by; but this would be so whatever the title to the houses in which they resided and is relevant only as one of the facts which in conjunction with the rest may lead to the inference of law that it was an implied term of the contract of service of each individual master that part of the services he was obliged to perform as a servant was to continue to reside in the house he was licensed to occupy. For the reasons already given the other facts to which I have referred would make such an inference erroneous in law.

With great respect to LORD MACDERMOTT, C.J., I think that in the case of the Castle Lane houses he, too, was deflected by a similar misunderstanding of LORD HODSON's speech in the *Glasgow City Corpn.'s* case (1) from directing his mind exclusively to the question whether a term was to be implied in the individual contract of employment of each assistant master. But he did suggest that a strong case could be made for the proposition that the licence "worked a modification of the original contract [i.e., of employment] while it was operative". With great respect, I cannot accept this. The licence creating the master's obligation to reside formed no part of his contract of service. At the highest it was collateral thereto in the sense that the existence of the contract of service was the reason why he was granted what the Lands Tribunal rightly described in more than one place as the "privilege" of the licence. The duties which he was obliged to perform under his contract of service during the currency of the licence were no different from before. They would remain the same if he terminated the licence, as he was entitled to do. To fail to reside would be a breach of his covenant in the licence but not of his contract of service. As counsel for the commissioner cogently pointed out, the board could obtain an injunction to enforce the master's covenant in the licence to reside in the house which they could not do if to reside there was a duty imposed on the master by a contract of service and not otherwise.

In the appeal in respect of the six Castle Lane houses I accordingly agree with CURRAN, L.J., that it should be allowed.

Order accordingly.

Solicitors: *Linklaters & Paines*, for *Chief Crown Solicitor*, Belfast; *Bower, Cotton & Bower*, for *Falls & Hanne*, Enniskillen.

G.F.L.B.

[1] 129 J.P. 250; [1965] 1 All E.R. 730; [1965] A.C. 609.

HOUSE OF LORDS

(LORD REID, LORD MORRIS OF BORTH-Y-GEST, LORD GUEST, LORD UPJOHN and LORD WILBERFORCE)

July 9, 29, 1969

PINNER v. EVERETT

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Breath test—"Person driving or attempting to drive a motor vehicle"—Driver temporarily stopping and leaving car—Suspicion arising after actual driving of vehicle has ceased—Road Safety Act, 1967, s. 2 (1).

By s. 2 (1) of the Road Safety Act, 1967: "A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body . . ."

This subsection covers a period of time when a vehicle has ceased to be in motion on a road. Where a person who has been driving a car has temporarily stopped the car and got out of it it is a question of fact and degree in each case how long thereafter he can be said to be "driving or attempting to drive" the car within the sub-section: Per the House of Lords, LORD GUEST, dissenting.

Per LORD MORRIS OF BORTH-Y-GEST: The suspicion mentioned in s. 2 (1) (a) need not arise during a period in which the car is actually being driven. It is sufficient if it arises after the driver has stopped the car and left it.

APPEAL by James Hugh Pinner from an order of a Divisional Court of the Queen's Bench Division dismissing his appeal against his conviction by justices for Huntingdon and Peterborough on a charge of failing to supply a specimen for a laboratory test contrary to s. 3 of the Road Safety Act, 1967.

Hugh Griffiths, Q.C., and J. F. A. Archer for the appellant.

R. M. O. Havers, Q.C., and F. E. F. Wybrants for the respondent.

Their Lordships took time for consideration.

July 29, 1969. The following opinions were delivered.

LORD REID: The appellant was driving home at about 1.0 a.m., and a police car happened to be following him. The police had no criticism of his driving, but they saw that his rear number plate was not illuminated so they stopped him. What followed is set out in the Case Stated by the justices after he had been convicted of failing without reasonable excuse to provide a specimen of blood or urine:

"(d) The appellant brought his car to a halt in a normal and proper manner, and got out of his car. There was conversation between the appellant and the police officers in the course of which the appellant was told that his number plate was dirty and not illuminated and there was also a reference by the police officers to their duties in checking as a matter of routine on the identities of drivers of cars which might not belong to them.

(e) In the course of conversation with the appellant the police officers noticed that his breath smelt of alcohol, and the police officers then had thereby reasonable cause to suspect the appellant of having alcohol in his body.

(f) A constable in uniform requested the appellant to provide a specimen of breath for a breath test.

(g) The appellant protested that the officers had no right to require him to provide a specimen of breath for a breath test since they had had no cause

to suspect him of having alcohol in his body while he was driving and since he had not committed a traffic offence or been involved in an accident.

(h) After some 20 minutes delay and after the appellant had been told that if he did not provide a specimen of breath for a breath test he would be arrested, he agreed to do so.

(i) The device indicated that the proportion of alcohol in the appellant's blood exceeded the prescribed limit. The appellant was arrested and a further breath test at the police station gave the same indication.

(j) The appellant was thereupon requested to provide a sample of blood or urine for a laboratory test and all the proper formalities required by s. 3 (1), (6), and 10, of the Road Safety Act, 1967, were observed.

(k) The appellant behaved completely normally and rationally while at the police station and fully understood the warnings given to him of the possible consequences of failure to provide a specimen of blood or urine.

(l) The appellant in terms declined to provide a specimen of blood or urine, and we found no reasonable excuse for his failure to do so."

The question to be determined is whether in these circumstances the constable had any right to require the appellant to take a breath test. If he had not then admittedly the conviction must be quashed. Whether he had that right depends on the proper interpretation of s. 2 (1) of the Road Safety Act 1967. This section authorises a constable to require "any person driving or attempting to drive a motor vehicle" to take such a test if the constable "has reasonable cause— (a) to suspect him of having alcohol in his body . . ."

In my view the crucial question is whether the appellant was "driving or attempting to drive" when the constable requested him to provide a specimen of his breath. In this Act and in the principal Act, the Road Traffic Act 1960, a clear distinction is made between a person driving or attempting to drive and a person in charge of a motor vehicle. The appellant was certainly in charge of his car at the relevant time but was he then driving or attempting to drive it?

In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.

The second point of law certified by the Divisional Court in this case is

"Whether the requirement [of a breath test] can only be made of a person who, though no longer actually driving can in general terms be described as the driver."

I decline to answer that question. It asks me to choose between two phrases "actually driving" and "the driver", neither of which is to be found in the Act. It is in effect substituting "the driver" for the statutory words "person driving or attempting to drive". The two are not the same. A person can often be properly called the driver although for quite a long time he has neither been driving nor attempting to drive. Suppose several people go off for the day in a car to the seaside and only one is to do the driving. Throughout their sojourn by the sea it would in ordinary parlance be proper to call that one person the driver, but it could not be said that throughout that period he was either driving or attempting to drive the car.

I must, therefore, consider in what circumstances a person can, by the ordinary usage of the English language, properly be said to be driving a car. Clearly the term cannot be limited to periods during which the car is in motion. Suppose the car is held up in a traffic jam and is stationary for five or ten minutes. No one would say that the driver is not driving the car during that period. He may have switched off the engine and be reading a book or a map; or he may have got out to clean his windscreen; and I do not think that it would make any difference if he got out to buy a paper from a news vendor on the pavement. But, on the other hand, suppose the driver pulls up at the kerb and leaves his car to go shopping. I do not think that it could be said that he is driving the car while he is buying groceries. And I do not think that it would make any difference if he remained in the car while his passenger was doing the shopping; he would then not be driving but waiting for his passenger.

Can it, then, be said that to give this ordinary meaning to these words would defeat the manifest intention of Parliament? I do not think so. If a man stopped in a traffic jam is still driving, so also he is still driving if stopped by a policeman, and it must then be a question of degree and of circumstances for how long thereafter he can properly be said to be still driving. The mere fact that he has got out of the car would not be enough.

But in the present case it would seem from the findings which I have quoted that an appreciable period of time must have elapsed before the police officers noticed the smell of alcohol, formed their suspicions, and required the breath test to be taken. During that period they were conversing with him about other matters which had nothing to do with his driving—the unilluminated number plates and a routine check on the identity of drivers. So the question is whether at the time when the breath test was required the appellant could still be said to be driving his car. I find this case to be very near the border-line but with some hesitation I am prepared to agree with the majority of your Lordships that the appellant was then no longer driving his car within the ordinary meaning of the words. I would allow this appeal.

LORD MORRIS OF BORTH-Y-GEST: After the appellant was arrested he in terms declined to provide a specimen of blood or urine. The justices found that he had no reasonable excuse for his failure to do so. His conviction (under s. 3 of the Road Safety Act 1967), was therefore unquestionably correct unless his arrest (under s. 2) was not warranted. He had in fact, though after protest, provided a specimen of his breath for a breath test. The result of the test was that the device by means of which the test was carried out indicated that the proportion of alcohol in his blood exceeded the prescribed limit. His arrest followed. But the appellant says that his arrest was unlawful for the reason that he ought not to have been required to submit to a breath test at all. So the question arises whether the wording of s. 2 (1) was satisfied. For present purposes the relevant words are:

“A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body . . .”

I think that the word “him” must refer to a “person driving or attempting to drive a motor vehicle on a road or other public place.” The question is therefore whether the police, when they had reasonable cause to suspect the appellant of having alcohol in his body (as the justices found that they had), were so suspecting someone who came within the words “any person driving or attempting to drive a motor vehicle on a road or other public place.”

The appellant was on the way to his home. He was driving his car on the A.1 road shortly before 1.0 a.m. on 5th February 1968. When his car was followed by police officers (in their police patrol car) they noticed that his rear number plate was not illuminated as required by the Vehicles (Excise) Act 1962, and the regulations made thereunder. So after the appellant had turned off the A.1 road on to the A.14 road they overtook him and signalled to him to stop. He did so. He brought his car to a halt (in a normal and proper manner) and got out of his car. The Case Stated does not record whether or not he stopped his engine. I will assume that he did. Conversation followed. Quite naturally the police told the appellant why they had stopped him. They told him that his number plate was dirty and was not illuminated. They referred to their duties in checking (as a matter of routine) on the identities of drivers of cars which might not belong to them. The circumstance that the appellant's number plate was not illuminated would seem to make the check both reasonable and desirable. It was in the course of the conversation that the police officers noticed that the appellant's breath smelt of alcohol; thereby they then had reasonable cause to suspect the appellant of having alcohol in his body. They had not so suspected when they were following him on the A.1. Their request for a breath test which they then made was for some time resisted by the appellant. He challenged their right to require one on three grounds: (a) he said that they had no cause to suspect him of having alcohol in his body "while he was driving"; (b) he said that he had not committed a traffic offence; (c) he said that he had not been involved in an accident. As to (b) he had not committed a "traffic offence" within the meaning of those words in the section. (See s. 2 (8).) As to (c) he had not been involved in an accident. Was he a "person driving or attempting to drive" whom the police officers had reasonable cause to suspect of having alcohol in his body? As such reasonable cause to suspect was at the moment when the motor car had stopped and was not in actual motion on the road—was the appellant at such moment a "person driving or attempting to drive"? Just before the car stopped and when it was in actual motion on the road the appellant was, I think, clearly a person driving it. Did he cease to be a person driving it at the moment the wheels of the car ceased to turn and to progress along the road? In my view, the answer is in the negative.

Section 2, in my view, covers the moment in time when a motor car has just ceased to be in actual motion on a road. The requirement can relate to that time. Provided certain conditions are satisfied a constable in uniform may require a person driving (or attempting to drive) a motor vehicle on a road (or other public place) to provide a specimen of breath for a breath test "there or nearby". Is the police officer to get somehow into or on to a moving car? Clearly not. The words "person driving" cannot in the context denote someone who is driving a car which is still proceeding along the road. The breath test which is to be made "there or nearby" is not a test to be made in a car which is moving along; the specimen of breath is not to be given by someone in a car who is causing it to progress along the road. One circumstance in which the requirement to provide a specimen of breath may be made to a "person driving" is if a constable in uniform has reasonable cause to suspect such "person driving" of having committed a traffic offence while the vehicle "was" in motion. (See s. 2 (1) (b).) In my view, there are the clearest possible indications that the "person driving" may still be the "person driving" even after the motor vehicle is no longer "in motion". The specimen of breath which may be demanded of a "person driving" may be demanded, therefore, of someone who is no longer causing a motor vehicle to be in actual motion on the road. The suspicion which a constable may have will relate to such a person. I think it follows that if a police officer reasonably

suspects such a person of having alcohol in his body a specimen of breath may be required.

The Divisional Court certified that two points of law were involved in their decision dismissing the appellant's appeal from his conviction for failing without reasonable excuse to provide a specimen for the laboratory test as required by s. 3. The first was thus framed: "Whether in the case of a requirement under s. 2 (1) (a) the suspicion must arise during the time of actual driving." In my view, the answer is—No. It is not essential that it should arise during that time. There are no such words as "actual driving" in the section. The requirement may be made of "any person driving or attempting to drive a motor vehicle" if the constable has reasonable cause to suspect "him" of having alcohol in his body. The suspicion must, therefore, be of "any person driving or attempting to drive". If someone who had been driving a car along a road ceased at once to be "a person driving" the very moment the car for any reason stopped then a suspicion occurring after the car had stopped would not be a suspicion relating to a person driving. But, in my view, someone may be within the words "person driving" even though his motor vehicle is at the moment stationary. Thus, if a motor vehicle is held up by traffic lights and becomes stationary, the person who continues in the driving seat and who is merely waiting for the moment to proceed must be within the description of "person driving". A temporary delay might be such that the person would think it reasonable to stop his engine and perhaps temporarily stand by his car; he would still be a "person driving". If during such a temporary halt he was recognised by a constable in uniform as being someone who was disqualified from driving, I would regard him as being within the words "person driving". The provisions of s. 30 of the Road Safety Act 1967, are as follows:

"A constable in uniform may arrest without warrant any person driving or attempting to drive a motor vehicle on a road whom he has reasonable cause to suspect of being disqualified for holding or obtaining a licence granted under Part II of the principal Act."

Just as under s. 2 it would seem irrational to suppose that a specimen of breath for a breath test had to be given by someone driving a car which was in actual motion, so it would be irrational to suppose that an arrest (under s. 30) of a person driving had to be an arrest in a car in motion. In my view, the words "person driving" in s. 2 at least cover and include someone who has been driving but who has temporarily interrupted his driving and who is about to resume driving.

The second point of law involved in the decision of the Divisional Court which they certified as being of general public importance was thus framed:

"Whether the requirement can only be made of a person who, though no longer actually driving can in general terms be described as the driver."

In my view, the requirement is to be made of someone who can properly be described as a "person driving or attempting to drive" within the meaning of those words in s. 2. I have endeavoured to set out that meaning. It is, in my view, unnecessary and may be misleading to refer to such person as being one who could "in general terms be described as the driver". Someone might in general terms be described as "the driver" who, although he had been the "person driving", had ceased to be the "person driving" at the relevant moment. Thus, if someone intended to park his car in the road outside his home he might drive to a place outside his house and there stop; just before and at that very instant he would be a "person driving" and in general terms he could be described as "the driver". But if, having finished his journey, he stopped his engine and locked his car and

went inside his home, he would then have ceased to be a "person driving" although in general terms someone might still describe him as "the driver". Questions of fact and of degree may well arise. In his judgment in *R. v. Price* (1), LORD PARKER, C.J., said:

"The subsection is not very happily worded because, if read literally, it would mean that the constable could only require the breath test if the person was actually driving or attempting to drive, something which is obviously impossible and not intended. Counsel for the appellant, while admitting that, says in effect that the grounds of suspicion that the appellant had alcohol in his body must relate to a time, so he says, when the vehicle is being actually driven or an attempt made to drive it.

"This court can see no ground whatever for construing the subsection in that way. It seems to this court that the phrase 'any person driving'—once one realises that it clearly cannot refer to the time when the vehicle is in motion—applies to what one might call generally 'the driver', somebody who is not only at the steering wheel while the vehicle is in motion but somebody who is in the driving seat while the vehicle is stationary; and what is more, somebody who has got out of the driving seat albeit temporarily and can still be termed, in general terms, 'the driver'."

On the facts of that case I think that the appellant, who stopped his car temporarily and went to a lavatory, was properly held to have been a "person driving". The words of LORD PARKER, C.J., must be read in their context, and it is to be noted that although he pointed out that a "person driving" (such as a person still in the driving seat after a vehicle has come to rest or a person who "temporarily" left his driving seat) was one who might generally be called "the driver", LORD PARKER, C.J., at no time said that every person who could in any sense of the word be called the driver must necessarily be within the words "person driving".

There is, however, in my view, no need to use any other words than those which are in the Act, i.e., the words "any person driving or attempting to drive" once it is seen what in their context their meaning must be.

In agreement with what was said on this matter in *Campbell v. Tormey* (2), I consider that someone who has been driving and who merely temporarily stops his car may be held to be within the words "person driving or attempting to drive". On the facts of the present case the appellant was such a person. He was driving his car to his home. He had not intended to stop. He was asked to stop by the police who saw that his rear number plate was not illuminated. They stopped him for a proper reason. There was no thought or suggestion of making a random breath test. Being required to stop the appellant did so.

As a person driving a motor vehicle on a road he was under legal obligation to stop on being required to do so by the police (see s. 223 of the Road Traffic Act 1960). He was much more than someone who could be described as being in charge of a car. His immediate journey was not over. He had every intention of continuing it. He was, in my view, a "person driving" at the time the police spoke to him.

The facts as found do not suggest that the first part of the conversation was any more than was necessary and essential to explain why the car had been stopped. I see no reason to surmise that the explanation was in any way prolonged. The period of time occupied by it could only have been quite brief. It was then, as the Case finds, that the police officers had their reasonable suspicion entitling

(1) Ante, p. 47; [1968] 3 All E.R. 814.

(2) Ante, p. 267; [1969] 1 All E.R. 961.

them to make the request that they then made. The delay (during which time the appellant argued as to his rights) was subsequent. Before that time the police officers had reasonable cause (as has been held) to suspect him of having alcohol in his body. They were entitled to require him to provide a specimen of breath for a breath test. His later arrest was warranted. In my view, the Divisional Court came to a correct conclusion. I would be in favour of dismissing the appeal.

LORD GUEST: The appellant was driving his Ford Zodiac car about 1.0 a.m. on 5th February 1968, along the A.1 on his way to his home in Little Stukeley. He was followed by a police car containing two police constables in uniform. There was nothing abnormal about his driving of the motor vehicle to attract their attention, but they noticed that its rear number plate was not illuminated by a white light as required by the relevant regulations. They overtook the appellant and signalled him to stop. The appellant brought his car to a standstill at the side of the road in a perfectly normal manner. The appellant got out of the driving seat and in the course of conversation with him concerning the unilluminated number plate the constables noticed that his breath smelt of alcohol. They required him to take a breath test, which the appellant at first refused to do, but ultimately he was persuaded to take a breath test which proved positive. He was then arrested and taken to a police station where a second breath test also proved positive. He was then required to provide a specimen of blood or urine. He refused and he was duly charged before the justices sitting at Huntingdon with an offence under s. 3 (3) of the Road Safety Act 1967, in that, without reasonable excuse he did fail to provide a specimen for a laboratory test. He was subsequently convicted by the justices and his appeal to the Divisional Court failed. The relevant section of the Road Safety Act 1967, is in the following terms:

"2.—(1) A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—

- (a) to suspect him of having alcohol in his body; or
- (b) to suspect him of having committed a traffic offence while the vehicle was in motion.

Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence."

Section 3 (1) of the Act provides that a person who has been arrested under s. 2 may, while at the police station, be required by a constable to provide a specimen for a laboratory test, and by sub-s. (3) a person who without reasonable cause fails to provide a specimen for a laboratory test in pursuance of a requirement is guilty of an offence. The justices found in the Case Stated that the appellant, when he was required to take a breath test, had not completed his journey and that when he was stopped he was still a person driving within the meaning of s. 2 (1) notwithstanding that the vehicle was stationary and that he had dismounted. **LORD PARKER, C.J.**, giving the judgment of the Divisional Court, dismissed the appeal. He followed his own reasoning in *R. v. Price* (1), which, be it noted, was a case under s. 2 (1) (b) of the Act of 1967, and held that the appellant was still "the driver" of the vehicle, and, therefore, could properly be required to take a breath test under s. 2 (1).

(1) Ante, p. 47; [1968] 3 All E.R. 814.

It is clear that there is a distinction running throughout the various Road Traffic Acts 1930 to 1960 and repeated in the Road Safety Act 1967, between the offence of driving and the offence of being in charge of a motor vehicle. For the latter offence a lower scale of penalties is provided. Under s. 2 (1) of the Road Safety Act 1967, there are only three circumstances under which a person may be required to take a breath test. The first two are contained in s. 2 (1) whereby:

"A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body; or (b) to suspect him of having committed a traffic offence while the vehicle was in motion..."

The third circumstance is that envisaged in sub-s. (2) which provides that:

"If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test..."

Under s. 2 (1) the suspicion which a constable has of a person of having alcohol in his body must relate to his driving or attempting to drive the motor vehicle. This in contradistinction to sub-s. (2) where the requirement can be made of any person whom the constable has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident. Driving a motor vehicle on a road or public place connotes a physical act. It is true that the section must be given a reasonable interpretation and cannot be interpreted literally because a request for a breath test cannot be made while a vehicle is in motion. Nor is there any reason to confine the act of driving to driving while the vehicle is in motion. Among the normal incidents of driving a motor vehicle is stopping at traffic lights, in traffic congestion or at a railway crossing. A person might be still said to be driving when he leaves the vehicle for a purpose connected with the driving of the vehicle, such as filling up with petrol or changing a wheel. Different considerations might arise if the vehicle had broken down. But when the person dismounts from the driving seat he ceases to be driving the vehicle, and if he dismounts for a purpose unconnected with the driving of the vehicle such as to talk to police constables in response to their enquiry unconnected with his driving that is not a normal incident of driving the motor vehicle. Counsel for the respondent submitted that the question when a person can be said to be driving a motor vehicle although not in the driver's seat is a question of degree. If this view is correct, it seems to me to be difficult to know where to draw the line. Is it to be a question of time or is it to be a question of distance?

The justices took the view that as the appellant had not completed his journey he was still driving. I do not regard this as a satisfactory test. A motorist from London to Edinburgh might not have completed his journey until he reached Edinburgh notwithstanding that he stopped for meals and overnight en route. The Divisional Court's test of whether the appellant was "the driver" I regard as equally unsatisfactory. The Act does not speak of "the driver" of a motor vehicle but "driving a motor vehicle" which is the appropriate test. If "driver" was the proper interpretation of s. 2 (1) there would be no necessity to include the offence of attempting to drive a motor vehicle, because that would be covered by the character of the driver. Moreover, "the driver" of the motor vehicle is an indefinite expression leaving large areas of uncertain territory.

It is to be noted that under s. 2 (1) (b) in the case of a suspicion that the person has committed a moving traffic offence the requirement to take a breath test cannot be made unless it is made as soon as reasonably practicable after the commission of the traffic offence. There is no extension of time in relation to s. 2 (1) (a) (suspicion of alcohol) thus emphasising the necessity of the close relationship between the driving and the suspicion of alcohol.

It may be necessary in future cases to seek further refinements, but where, as here, there is nothing in the driving of the vehicle to cause the constables to have reasonable cause to suspect that the appellant had alcohol in his body, the constables were not, in my view, entitled to require the appellant to take a breath test. He was consequently not legally arrested.

For these reasons I would allow the appeal.

LORD UPJOHN: The relevant facts are sufficiently stated in the Case Stated and I do not propose to restate them. While the actual point at issue turns on the true construction of a few words in s. 2 of the Road Safety Act 1967, some reference to the earlier Road Traffic Acts is, I think, helpful. Section 6 of the Road Traffic Act 1960, which consolidated with amendments the existing law, made it an offence to drive a motor vehicle when a person was unfit to do so on a public road through drink or drugs (a definition later altered by s. 1 of the Road Traffic Act 1962, but which is immaterial for the purposes of this appeal). Section 6 (1) prescribed certain penalties "when driving or attempting to drive" in such circumstances. Section 6 (2) prescribed certain lesser penalties "when in charge of a motor vehicle . . . (but not driving the vehicle)". The Act there drew a clear distinction between driving a vehicle, on the one hand, and being in charge of a vehicle on the other.

The Road Safety Act 1967, by s. 1 (1) created the new offence of driving or attempting to drive a motor vehicle with an excess of alcohol in his body as ascertained by a subsequent laboratory test.

The vital section for the purposes of this appeal is s. 2; sub-s. (1) and sub-s. (2) are in these terms:

"(1) A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—

- (a) to suspect him of having alcohol in his body; or
- (b) to suspect him of having committed a traffic offence while the vehicle was in motion.

Provided that no requirement may be made by virtue of paragraph (b) of this subsection unless it is made as soon as reasonably practicable after the commission of the traffic offence.

"(2) If an accident occurs owing to the presence of a motor vehicle on a road or other public place, a constable in uniform may require any person who he has reasonable cause to believe was driving or attempting to drive the vehicle at the time of the accident to provide a specimen of breath for a breath test . . ."

There follow some immaterial exceptions.

It is clear that the opening words of s. 2 (1) cannot be given a literal meaning, for no one supposes that it is possible for a police constable to require a person to provide a specimen for a breath test while that person is actually driving a motor vehicle in motion on a public road.

The Court of Appeal (Criminal Division) in *R. v. Price* (1) sought to get over this difficulty by treating the phrase "any person driving" as equivalent to the expression "the driver". I cannot agree with the reasoning of LORD PARKER, C.J., which is, with all respect, based on a misreading of the section. The Act did not use the words "the driver", a broader phrase equally appropriate, in my view, in some circumstances to include a person in charge of a motor car but not driving it.

It is seldom that any difficulty will arise in cases under s. 2 (1) (b) or (2), but neither of those cases apply here for the failure of the appellant to illuminate his rear number plate was not a road traffic offence; but it is to be observed as an aid to construction of s. 2 (1) (a) that, in cases arising under s. 2 (1) (b), it is contemplated that at the time of the event giving rise to the right of the constable to demand a breath test the suspected traffic offence must have been committed while the vehicle was in motion, and in cases under s. 2 (2) the vehicle will normally be in motion, although I suppose it is right to include the case where a motor vehicle had come to a halt before the accident.

What interpretation, then, is to be given to s. 2 (1) (a)? In my opinion, to bring the case within that paragraph the police constable must have reasonable cause to suspect the person of having alcohol in his body at the time when he can properly be said to be driving or attempting to drive the car. It is to be noted that there is no power under s. 2 to require a breath test of one who is merely in charge of a motor car but is not driving or attempting to drive it, and the Act of 1967 further ameliorated conditions for a person who, having started to drive, realises his ability to drive properly is impaired through drink or drugs and so pulls in to the side of the road to recover, by the repeal of para. (ii) in s. 6 (2) of the Act of 1960. Clearly such a person is not, for the purposes of the Acts, driving; he is not even in charge, provided of course that he can establish the necessary facts under para. (i).

But, my Lords, "driving or attempting to drive a motor vehicle" is not, in my opinion, capable of further definition; it is a question of fact and degree in every case.

A person in the driving seat preparing to drive by switching on is, in my view, driving. It is not necessary that the vehicle should be in motion. A person is obviously driving although he may be in an almost interminable traffic block or waiting at a level crossing or at traffic lights or if he merely fills up with petrol; nor can it make any difference if in a traffic block he switches the engine off to prevent it overheating or to save petrol. But if the driver leaves his driver's seat it is more difficult. If the driver leaves his seat, removes the ignition key and locks up the car for the night, he is quite clearly, in the words of ASHWORTH, J., in *Campbell v. Tormey* (2) "no longer driving or intending to drive the vehicle within the plain meaning of that expression." ASHWORTH, J., also rightly pointed out that even if there is no remedy under s. 2 of the Act of 1967, circumstances may entitle the constable to arrest the person under s. 6 (4) of the Act of 1960 and then to apply the breath test under s. 3 of the Act of 1967.

Although I have criticised the use of the expression "the driver" in *R. v. Price* (1) I am not suggesting that that case was wrongly decided, for it was a s. 2 (1) (b) case. But the Court of Appeal also decided it under s. 2 (1) (a) and with all respect to that court I think it would certainly have been a difficult and border-line case. The driver voluntarily got out of the driving seat for the purely temporary purpose of relieving himself and his condition was at once detected.

(1) Ante, p. 47; [1968] 3 All E.R. 814.

(2) Ante p. 267; [1969] 1 All E.R. 961.

Other similar border-line cases may be posed, the driver who gets out of his car to do some trivial job while taking in petrol, or the driver who nips in to a nearby tobacconist for a packet of cigarettes while in a traffic jam or at a level crossing. These are all questions of fact and degree to be solved by the common sense of the bench of justices or the jury.

But as these cases are largely questions of fact and degree so that an appellate court cannot correct those findings unless there has been some misdirection or other error of law, it is quite clear that in this case the justices determined it on a wholly erroneous basis, namely, that the appellant had not completed his journey. The Divisional Court decided the matter on the equally erroneous basis of describing the appellant as "the driver".

Your Lordships must, therefore, decide the matter afresh. The onus is on the police to establish an offence under s. 2 (1) and (2) of the Act of 1967. All we know, summarising the facts in the Case Stated very briefly, was that the appellant drew up normally and properly on signals from the police car. Throughout the conversation which followed, and later at the police station he behaved normally and rationally. When stopped there was naturally a discussion as to why he had been stopped, namely, the condition of his rear number plate, and the necessity for the police to check on stolen cars. During the course of this discussion the police noticed that his breath smelt of alcohol, and, as the justices found, they then had reasonable grounds for supposing he had alcohol in his body and they asked him to take a breath test. He protested and refused. All this took 20 minutes.

But the appellant did not leave the driver's seat as a normal incident in the course of driving, nor was it immediately apparent as he left the driver's seat that there was any reason to suppose he had alcohol in his body. This only emerged during the course of a long conversation after he had been stopped by the police. In mentioning these circumstances I am not saying that they are decisive of other cases, for every case depends so much on fact and degree, but, in my opinion, on the facts of this case, the police fail to prove their case that at the time that the appellant was driving or attempting to drive they had reasonable grounds for supposing that he had alcohol in his body; the suspicion arose after he had ceased to drive. I would allow this appeal.

LORD WILBERFORCE: I concur with the majority of your Lordships in allowing this appeal.

Appeal allowed.

Solicitors: *Greenwoods*, for *Greenwoods*, Peterborough; *Bell, Brodrick & Gray*, for *Maule, Sons & Winter*, Huntingdon.

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., COOKE AND BRIDGE, JJ.)

June 30, 1969

COUPE v. BARRETT

Public Health—Refuse collection—Means of access by which refuse removed from house—Obstruction—Need to prove easement—Insufficiency of licence—Public Health Act, 1936, s. 55 (2).

The respondent owned a terrace house which contained a passageway running under one of the bedrooms to his back garden. There was a gate in the passageway which provided access to the back garden and therefrom to the back gardens of adjoining houses. The respondent's predecessors in title had for some years allowed the refuse collectors of the local authority to go through the passageway into his back garden and thence to the back gardens of adjoining houses. The respondent usually kept the gate in the passageway locked, but for a time opened it on each occasion when the refuse collectors came. Later, when going away on holiday, he locked the gate and put up a notice stating that thenceforward there would no longer be access for the local authority's employees through the passageway and that alternative arrangements should be made. Informations were preferred charging the respondent with closing and obstructing the means of access by which refuse was removed from houses in the road, contrary to s. 55 (2) of the Public Health Act, 1936. Justices dismissed the informations. On appeal by the prosecutor,

HELD: nothing short of proof of an easement entitling the council's dustmen to go over the respondent's back garden would suffice to constitute a "means of access" within the meaning of s. 55 (2) of the Public Health Act, 1936; mere leave or licence was insufficient; no such easement had been proved; therefore it was impossible to say that any offence had been committed by the respondent, and the appeal must be dismissed.

CASE STATED by Brentford justices.

On 4th November 1968 informations were preferred by the appellant, Marshall William Coupe, solicitor to the council of the London Borough of Hounslow, charging the respondent, Leslie Barrett, with having closed and obstructed the means of access by which refuse and faecal matter was removed from houses at Linkfield Road, Hounslow, contrary to s. 55 (2) of the Public Health Act 1936. The justices dismissed the informations, and the prosecutor appealed.

D. R. M. Henry for the appellant.

The respondent appeared in person.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the Middlesex area of Greater London sitting at Brentford who dismissed two informations preferred by the appellant against the respondent for that he on two dates, 3rd and 10th September 1968, did obstruct the means of access by which refuse was removed from certain houses in Linkfield Road, contrary to s. 55 (2) of the Public Health Act 1936.

The respondent's house, 185 Linkfield Road, is part of a terrace of houses and contains a passageway, which indeed runs underneath one of his bedrooms, to his back garden. Entrance to the passageway is effected through a gate at the front and in his back garden on each flank are gates going into the back gardens of the adjoining terrace houses. Apparently for some years his predecessors in title allowed the refuse collectors of the Hounslow Borough Council to go through the passageway into the back garden and go to the backs of two adjoining terrace houses. When the respondent became the owner, for a time apparently he allowed this to continue, opening the door on each occasion when the refuse

collector came, but being minded to go away on holiday he locked the gate and put up a notice saying—

“ Will you please note that from this time forward there will no longer be access for Council dustmen, coalmen, etc. through the passageway adjoining 185 Linkfield Road. Alternative arrangements should therefore be made. New owner.”

Since that day he has failed to open the door for the dustmen, hence this prosecution.

Section 55 (2) provides:

“ It shall be unlawful for any person except with the consent of the local authority to close or obstruct the means of access by which refuse or faecal matter is removed from any house . . . ”

The respondent's contention before the justices was that there never was any means of access in the sense of there being anybody's right to walk across his property, and that all that had happened in the past was that as a matter of leave and licence he and his predecessors in title had from time to time unlocked the door and let the dustmen through. As it seems to me nothing short of proving an easement entitling dustmen to go over the respondent's back garden will suffice to constitute a means of access. Mere leave or licence on one occasion, or more than one occasion, is in my judgment insufficient. On the findings set out in the Case I find it quite impossible to say that any offence has been committed; that was the view of the justices. Accordingly I would dismiss this appeal.

COOKE, J.: I agree.

BRIDGE, J.: I entirely agree.

Appeal dismissed.

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., COOKE AND BRIDGE, JJ.)

June 30, 1969

MILLER v. HOWE

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Breath test—Device—Proof of identity—Evidence of police constable—Road Safety Act 1967 (c. 30), s. 7 (1).

The defendant was arrested by a police constable on suspicion of having committed a traffic offence while a vehicle was in motion. He was taken to a police station after a breath test which proved positive. There he was given the opportunity of providing a further specimen of breath, but failed to do so, and he also failed to provide a specimen of blood or urine for a laboratory test. He finally picked up the device used for the breath test, threw it against a wall, and completely shattered it. He was charged with contravention of s. 3 (3) of the Road Safety Act, 1967. A police officer, giving evidence for the prosecution at the magistrates' court, said that the device was an "Alcotest 80." When asked in cross-examination how he knew this, he said: "Because it said so on the box." The box was not produced in evidence. It was not the practice of the police in any circumstances to produce the device because it contained corrosive substances. The justices dismissed the information on the ground that evidence was essential to establish that the device

used was an "Alcotest 80," and that the evidence of the police officer was inadmissible for this purpose. On appeal by the prosecutor,

HELD: (i) the device being a chattel, physical production of it was not necessary, but proof of its identity was required; (ii) evidence of a police officer identifying the device from his own knowledge and experience was admissible; and the case must be remitted to the justices.

CASE STATED by Penrith (Cumberland) justices.

On December 31, 1968, an information was preferred by the appellant, Robert Miller, an inspector of police, against the respondent, Frank Howe, charging that he on December 16, 1968, at Penrith failed without reasonable excuse to provide a specimen for a laboratory test in pursuance of a requirement imposed under the Road Safety Act 1967, s. 3 (3). On the hearing of the information evidence was called by the prosecution, and then it was then submitted that there was no case for the respondent to answer as there was no admissible evidence that the device used when the respondent was asked to provide a specimen of breath was of a type approved by the Secretary of State, namely, an "Alcotest ® 80". Evidence was given before the justices by the police constable who required the respondent to provide a specimen of breath, and he stated that the device was an "Alcotest 80". When he was cross-examined as to such knowledge, he said he knew it to be such "because it said so on the box". Neither the device nor the box was produced in evidence. The justices were of the opinion that evidence was essential to show that the device used was an "Alcotest ® 80", and the evidence of the police constable was not admissible for this purpose. They dismissed the information, and the prosecutor appealed.

The questions for the opinion of the court were: (a) Was proof of the identity of the device essential? (b) If such proof was essential, was the evidence of the police constable such as the justices should have admitted and sufficient to prove that an "Alcotest ® 80" had been used in the instant case?

A. M. Hill for the appellant.

E. Sanderson Temple, Q.C., for the respondent.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the county of Cumberland sitting at Penrith who dismissed an information preferred by the appellant against the respondent that he failed without reasonable excuse to provide a specimen for a laboratory test in pursuance of a requirement imposed under the Road Safety Act 1967, s. 3 (3).

The short facts here are that on 16th December 1968 the respondent was driving a motor vehicle on a road, and a police constable, claiming to have reasonable cause to suspect him of having committed a traffic offence while the vehicle was in motion, required him to provide a specimen of breath for a breath test. A breath test, as I understand it, was taken which presumably proved positive and he was thereupon taken to a police station. At the police station he was given the opportunity to provide a specimen of breath again, but he failed to do so. He further failed to provide a specimen of blood or urine for a laboratory test. Finally, at the police station he picked up the device used for the breath test and threw it against the wall where it completely shattered.

There seem to be no end to the number of points which can arise under the Road Safety Act 1967; the present one so far as I know is novel. It is conceded here that the equipment known as "Alcotest ® 80" is approved by the Secretary of State, but it was submitted before the justices that the prosecution had not proved that the device used in the present case was an Alcotest ® 80. A police constable in examination having said it was an Alcotest ® 80, was asked in cross-examination how he knew that, and he answered: "Because it said so on the box". The box was not produced in evidence. The justices say:

"We were of the opinion that evidence was essential to show that the device used in the instant case was an 'Alcotest 80', but that the evidence of the police constable was not admissible for this purpose. Since the device would not have been produced to us in any event, regardless of whether it had been shattered by the respondent, we dismissed the information. The questions for the opinion of the court are: a. Was proof of the identity of the device essential? b. If such proof was essential, was the evidence of the police constable such as we should have admitted and sufficient to prove that an 'Alcotest 80' had been used in the instant case?"

That reference to the fact that the device would not have been produced in any event regardless of whether or not it had been shattered was a reference to police practice—in my judgment, a very reasonable practice—that these devices are destroyed at an early stage because they contain corrosive substances. At any rate they are not as a matter of practice retained and labelled until the particular summons is heard. It seems to me that that is quite proper because we are dealing here with chattels where the production of the chattel is not necessary. There is a long history of cases on this matter, but the most recent is *Hockin v. Ahlquist Brothers, Ltd.* (1), where it was held that in dealing with chattels it is unnecessary that a chattel should be produced, and that it is perfectly proper to give evidence as to the condition and nature of the chattel. Accordingly, like the justices, I base nothing on the fact that this particular device was destroyed by the respondent, or indeed that the police as a matter of practice destroy the devices after use. But to answer the first question put by the justices, I would say that proof of the identity of the device is essential.

As regards the second question, however, I disagree with the justices that the evidence of the police constable was not admissible to prove that identity. It seems to me that if, for instance—it is not this case—the police constable had said: "I remember this device very well. From my knowledge and experience over a number of years it was an Alcotest ® 80", and gone on to describe the particular device, what it looked like, its nature, and the fact that "Alcotest ® 80" was stamped on it, that would be perfectly good evidence from which the justices could, if they thought right, hold that proof of identity had been given. The only possible difficulty in the present case is that the police constable did not from his own experience and knowledge identify the device. He merely described the container, as opposed to the device, saying that on the lid or under the lid of that container were the words "Alcotest ® 80". Nevertheless, it seems to me that that is part of the description of at any rate the container of this device, the container in which the device comes, and is therefore some evidence, although its weight may not be so great, of the nature of the device itself.

Accordingly I would say that the justices were wrong in saying that the evidence of the police constable was not admissible evidence. On the other hand, my answer to the last part of the question, whether it was sufficient to prove that an Alcotest ® 80 had been used, is that it is a matter for the justices to determine according to what weight they attach to the police constable's evidence. I myself would only add, without seeking to influence the justices, that, bearing in mind that this was a submission of no case, they may well feel that, albeit of slight weight, the evidence of the police constable was sufficient to justify the rejection of that submission. Accordingly, I would send this case back to the justices to consider the submission of no case in the

light of the opinion of this court, and, if the submission is overruled, to continue the hearing.

COOKE, J.: I agree with LORD PARKER, C.J.'s judgment, and with the order which he proposes.

BRIDGE, J.: I also agree.

Case remitted.

Solicitors: *Gibson & Weldon*, for *Broatch & Son*, Keswick; *Arnison & Co.*, Penrith.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS AND KARMINSKI, L.JJ. AND LAWTON, J.)

June 30, 1969

R. v. PALIN

Criminal Law—Trial—Reference by witness to prisoner's bad record—Discharge of jury—Discretion of judge.

Where during the course of a trial a witness has made reference to the prisoner's previous convictions or bad record, the decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the Court of Appeal will not lightly interfere with the exercise of that discretion. The law on this matter so laid down in *R. v. Weaver* (1967), 131 J.P. 173, should be regarded as overruling earlier authorities to the effect that a jury ought almost invariably to be discharged in those circumstances.

APPEAL by William Richard Palin against his conviction before the assistant recorder (T. R. FitzWalter Butler, Esq.) at Oxford City Quarter Sessions of indecent assault.

During the course of the trial a witness for the prosecution (despite having been previously warned on the matter by the assistant recorder in the absence of the jury) made one reference to the appellant's having to go to court and two references to his going to prison. Defending counsel applied that the jury should be discharged, but the assistant recorder refused the application.

C. R. Oddie for the appellant.

Leo Clark for the Crown.

LAWTON, J., delivered this judgment of the court: The appellant, William Richard Palin, on 9th January 1969 at Oxford City Quarter Sessions was found guilty on an indictment containing counts of indecent assault on male persons. The first count charged him with indecently assaulting a boy called David Worrall, who was aged 11. The second count charged him with indecently assaulting David Worrall's brother, Phillip, aged nine. The third and fourth counts charged him with indecently assaulting a boy called Joseph English, aged, on the occasion of the first assault, 14, and of the second assault, 15. He now appeals to this court by leave of the single judge.

His first ground of appeal as put before the court by his learned counsel relates to all the counts in the indictment and it comes to this, that, during the course of the trial, one of the witnesses, a boy called Calway, in the course of his evidence made one reference to the appellant having to go to court and two references to the appellant's going to prison. For the purposes of this judgment, it is right that I should call attention to the words which actually came out in the course of Calway's evidence. He was asked this question:

"Was there anybody else doing any kissing besides the accused and English on that occasion? A.—When we got back to Blackbird Lees . . . [the appellant] said, 'I have got to go to court'."

A little later in his evidence, whilst being cross-examined, he was asked this question by counsel for the appellant:

"What you are saying is that he had given you 10s. in the morning and eventually in the evening you did kiss him? A.—It was that evening that he kissed me and he said, 'If I don't go into prison tomorrow you can do something for it'."

Still later in his cross-examination, counsel for the appellant said:

"Are you saying there came a time when you did not want to go on seeing [the appellant]? A.—Yes, when he went into prison."

Following that answer, counsel asked the assistant recorder to discharge the jury. The assistant recorder ruled that the jury should not be discharged and directed that the trial should go on.

Counsel conceded before us that the learned assistant recorder had a discretion, but he submitted that, in the circumstances of this case, the learned assistant recorder exercised his discretion wrongly. The basis of his argument was that the appellant was putting forward a difficult defence, i.e., that, although he had homosexual inclinations, he had not given way to them during his association with the three boys whose names appeared in the indictment. He submitted that anything which tended to hamper the appellant in putting forward his defence was something which should have been taken into consideration when the assistant recorder came to exercise his discretion. The court has come to the conclusion that the assistant recorder did exercise his discretion properly. There is nothing to indicate that he exercised it on wrong principles. Indeed, the short ruling that he gave indicates that he exercised it on right principles. So there is nothing in that ground of appeal.

Before the court leaves that ground of appeal, it would like to call attention to the way in which this matter was dealt with before us. Counsel for the appellant, following the practice of members of the Bar over many years, called our attention to *R. v. Peckham* (1). In particular, he relied on the passage in the judgment of LORD HEWART, C.J. This passage has been cited to courts time and time again in support of the proposition that courts ought almost invariably to discharge juries when matters of the kind which came out in the course of this case come out in the course of a trial. There must have been many prisoners over the years who have had juries discharged, perhaps to their advantage, perhaps otherwise, as a result of having that passage cited to courts. A full consideration of the report, however, shows that that court reminded itself that all cases of this kind have to be decided on their own facts. This court, which is the Criminal Division of the Court of Appeal and, therefore, a superior court to the Court of Criminal Appeal, reviewed all the authorities in *R. v. Weaver* (2). It is pertinent to point out that, on that occasion, the court was made up of judges with extensive circuit experience. The court reviewed all the authorities in the light of the experience of the court and it gave a definitive judgment as to what the law was with regard to this matter. I invite attention to the following passage in the judgment delivered by SACHS, L.J.:

(1) 100 J.P. 59; [1935] All E.R. Rep. 173.

(2) 131 J.P. 173; [1967] 1 All E.R. 277; [1968] 1 Q.B. 353.

"Then one comes to the final question: is there anything in this case, as put forward so persuasively by counsel for the appellants, to induce the court to say that, when he declined to discharge the jury, the discretion of the deputy chairman was wrongly exercised? Cases parallel to the present one have been brought before the Court of Criminal Appeal on a considerable number of occasions in the course of the last few years and the modern practice has become well defined. In each of those cases, of course, it has been natural for counsel for the appellant or applicant to cite a trio of cases which are mentioned in ARCHBOLD'S CRIMINAL PLEADING, PRACTICE AND PROCEDURE (36th Edn.), *R. v. Peckham* (1), *R. v. Palmer* (2) and *R. v. Firth* (3). Those cases cannot, however, be looked at in isolation. The modern practice evolved in the light of these cases is that in essence the matter now, as has often been said (see, for instance, a passage which appears in *R. v. Parsons* (4)) is that the decision whether or not to discharge the jury is for the discretion of the trial judge on the particular facts, and the court will not lightly interfere with the exercise of that discretion."

That being a definitive statement of law, it is to be hoped that for the future counsel will not cite the passage in LORD HEWART, C.J.'s judgment in *R. v. Peckham* (1) to which I have referred. The proper case to be cited when this matter comes up for consideration is the more recent and more authoritative case of *R. v. Weaver* (5).

It follows from what I have said that, so far as all counts in the indictment are concerned, the first ground of appeal fails. [HIS LORDSHIP considered the other grounds of appeal and said that the appeal was dismissed.]

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; Henry A. Galpin, Oxford.*

T.R.F.B.

(1) 100 J.P. 59; [1935] All E.R. Rep. 173.

(2) (1935), 25 Cr. App. Rep. 97.

(3) [1938] 3 All E.R. 783.

(4) [1962] Crim. L.R. 632.

(5) 131 J.P. 173; [1967] 1 All E.R. 277; [1968] 1 Q.B. 353.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND BRIDGE, J.J.)

July 1, 1969

R. v. RECORDER OF OXFORD. *Ex parte* BRASENOSE COLLEGE

Magistrates—Refusal by fire authority to issue fire certificate—Appeal by way of complaint to justices—Complaint dismissed by justices—Right of appeal to quarter sessions—Offices, Shops and Railway Premises Act, 1963, s. 72.

Where magistrates have dismissed a complaint by the owners of premises by way of appeal against the refusal of a fire authority to issue a fire certificate, the owners have a right of appeal to quarter sessions, since the dismissal of the complaint by the justices is "an order made by a magistrates' court on determining a complaint" from which a right of appeal to quarter sessions is provided by s. 72 of the Offices, Shops and Railway Premises Act, 1963.

MOTION on behalf of the Principal and Scholars of the King's Hall and College of Brasenose in Oxford for an order of mandamus addressed to the recorder of the city of Oxford directing him to hear an appeal by the applicants against the dismissal by justices of the county borough of Oxford of a complaint under s. 31 of the Offices, Shops and Railway Premises Act, 1963.

I. O. Griffiths for the applicants.

Gordon Skynn as *amicus curiae*.

The recorder did not appear.

LORD PARKER, C.J.: The applicants are owners in fee simple of two premises, 50, New Inn Hall Street and 21, St. Michael's Street in Oxford. Both those premises are let to firms of solicitors, and the number of people employed there is such that the present applicants required what is known as a "fire certificate" under the Offices, Shops and Railway Premises Act 1963. In due course they accordingly applied, as they were bound to do, to the fire authority for such a certificate; that was on 12th June. On 30th July the fire authority, which is the corporation of Oxford, refused to issue the necessary fire certificate unless somewhat substantial alterations were effected in accordance with specifications and plans within a period of 90 days. Thereafter the applicants, as they were entitled to do, appealed on 14th August 1968 by way of complaint to the justices; the justices on 24th September adjudged that the complaint be dismissed, and thereupon the applicants served notice of appeal on 2nd October to quarter sessions. When that appeal came on at quarter sessions, the recorder of his own motion took the point that he had no jurisdiction and so held. The sole question here, as will become clear in a moment, is whether s. 72 of the Act of 1963, which gives an appeal to quarter sessions, applies in the case of a dismissal of a complaint.

That being the history, it is convenient to look at one or two of the sections of the Act of 1963. Fire precautions are dealt with in a number of sections, beginning with s. 28. It is unnecessary to read s. 28, which is the section providing for precautions to be taken in the way of the provision of means of escape, and s. 29 (1) provides that in certain circumstances according to the number of employees in the premises or on different floors thereof, a fire certificate is required. It takes the form of making it illegal for more than a certain number of people to be employed:

"... unless there is in force with respect to the premises a certificate, (hereinafter in this Act referred to as a 'fire certificate') issued under the following provisions of this section by the appropriate authority (as hereafter in this

Act defined) that the premises are provided with such means of escape in case of fire for the persons employed to work therein, or proposed to be so employed as may reasonably be required in the circumstances of the case . . ."

Subsection (2) then goes on to provide that an application is to be made to the fire authority, and by sub-s. (3) the fire authority is put under an obligation to cause an inspection of the premises in question to be made. Then by sub-s. (4) the fire authority is given power to do certain things. It reads:

"Where the appropriate authority, after causing, in pursuance of the last foregoing subsection, an inspection to be carried out of any premises, inform the applicant that they will not issue a fire certificate with respect to the premises unless special alterations are made thereto, they shall specify the time within which the alterations are to be carried out and, if the certificate is not issued, it shall be deemed to have been refused at the expiration of the time so specified or such further time as the authority may have allowed."

All these steps were taken quite properly in the present case, and these were followed by an appeal to the justices. That is provided for by s. 31 (1), which so far as it is material reads as follows:

"A person who is aggrieved—(a) by the refusal of the appropriate authority to issue a fire certificate with respect to any premises; (b) by the refusal of the appropriate authority to amend a fire certificate issued with respect to any premises; (c) by being required under the last foregoing section by the appropriate authority to make any alterations to any premises or by the period within which he is so required to make any such alterations; (d) by the prohibition under the last foregoing section by the appropriate authority of effect's being given to proposals till alterations shall have been made to any premises; or (e) by the cancellation, in pursuance of subsection (5) of the last foregoing section, of a fire certificate issued with respect to any premises; may, within twenty-one days of the refusal . . . appeal . . . to a magistrates' court acting for the petty sessions area in which they are situate . . . and on any such appeal the court may make such order as it . . . thinks fit, and an order so made shall be binding on the appropriate authority."

An appeal, as I have said, was made to the justices, and the justices in dealing with the matter, adjudged that the said complaint be dismissed. The right of appeal from the justices to quarter sessions is set out in s. 72 of the Act. It reads:

"A person aggrieved by an order made by a magistrates' court on determining a complaint under this Act may appeal therefrom to a court of quarter sessions."

Let me say at once there is no doubt that the present applicants were persons aggrieved; compliance with the directions to alter the premises would inflict substantial financial loss on them, and the justices upheld those directions. No question, accordingly, arises but that they are aggrieved persons. The sole question is whether the wording of the justices' decision "It is this day adjudged that the said complaint be dismissed" was an order made on determining a complaint under the Act. I confess that approaching this matter apart from reference to other statutes and apart from decided cases, I have no doubt whatever but that adjudging a complaint to be dismissed is an order made on determining a complaint. Indeed, as was pointed out in the course of argument,

unless it is such an order, there was no power in the justices to dismiss the complaint. But, apart from that absurdity, it seems to me only common sense to say that under the powers given to them by s. 31 they are entitled on determining the complaint to make an order that the complaint is justified, to dismiss the complaint, or thirdly to vary the directions given by the fire authority as to the requirements which are considered reasonable. Those, as it seems to me, are all orders made on determining a complaint. Indeed, if one adopts the view taken by the learned recorder, one reaches the absurdity that no appeal lies in the present case, whereas if the justices had made but one small alteration in the directions given by the fire authority, an appeal would certainly lie on the part of the applicants. This is a short point depending, as it seems to me, purely on the construction of the words in s. 31 and s. 72 of this particular Act.

Having said that, it is clear that what worried the recorder and led him to come to the decision to which he came was the fact that in some statutes a clear distinction is drawn between an order meaning a positive order and a dismissal of a complaint or other determination. He referred in fact to s. 275 of the Highways Act 1959 where very wide words are used, namely, "an order, determination or other decision". But, in my judgment, no help is to be derived from the different wording in a statute such as the Highways Act, an appeal from which is laid down by s. 275 to be by way of complaint. The learned recorder also referred to the Magistrates' Courts Act 1952. No doubt he had in mind s. 45 (2) which provides in the case of a hearing of a complaint that:

"The court, after hearing the evidence and the parties, shall make the order for which the complaint is made or dismiss the complaint."

He may have read that as meaning that a dismissal of a complaint is not an order and that only an order for which the complaint is made is itself an order. In my judgment, no help is to be derived from those words. They really beg the question whether both the order for which the complaint is made and the dismissal are not themselves orders, and in fact when one looks at the Magistrates' Courts Rules 1962, r. 19, and the prescribed forms in regard to complaints, namely no. 78 and no. 79 in Appendix I, it is perfectly clear that not only the order on complaint but the dismissal of the complaint are both orders. Indeed, I find it difficult to see what the dismissal of a complaint is if it is not an order.

In these proceedings the corporation have not appeared, but the court has had the benefit of the presence of counsel as amicus in this case, who has fulfilled his duty by referring us to all the statutes and authorities on which any argument in favour of the recorder's view could possibly be based. I find it quite unnecessary to refer to those statutes or those authorities; it is in my mind perfectly clear that looking at the sections in question in this Act, the answer can only be that the dismissal of the complaint was an order made on the determination of the complaint. Accordingly I would issue an order of mandamus to the learned recorder to hear and determine this matter according to law.

MELFORD STEVENSON, J.: I agree.

BRIDGE, J.: I also agree. The word "order" in relation to legal proceedings in itself is ambiguous; clearly it may mean, perhaps, a linguistic purist would say that its most accurate connotation was to indicate, an order requiring an affirmative course of action to be taken in pursuance of the order, but it is equally clear that the word may have a much wider meaning covering in effect all decisions of courts, and that is really illustrated by the use in the Magistrates' Courts Rules 1952 of the expression "Order of dismissal of a complaint", to

which LORD PARKER, C.J., has referred as the heading of Form no. 78 provided by those rules. Which of the two meanings is appropriate must of course always depend on the context, and I entirely agree with LORD PARKER, C.J., that the use of the word "order" in other legislation, and observations on its meaning in decided cases on other statutes, is not in the last analysis of assistance to the court, although I, like LORD PARKER, C.J., am indebted to counsel as *amicus curiae* for his most interesting review of the authorities in determining a point of construction arising on a statute which has not been before the court previously. To my mind the matter is resolved as soon as one looks at s. 31 of the Offices, Shops and Railway Premises Act 1963, where on appeal by way of complaint to the justices from a refusal by the fire authority to issue a certificate, the only power given to the court is to make such order as it thinks fit. That necessarily indicates, in my judgment, that in s. 31 the word "order" is used in its widest sense and embraces the possibility of dismissal of the appeal. If it is so under s. 31, I can see no reason as a matter of language or as a matter of common sense of the statute or the convenience of the matter, why one should give it any different meaning when one looks at s. 72 and has to consider the scope of the jurisdiction of quarter sessions on appeal. For those reasons in addition to those mentioned by LORD PARKER, C.J., I too agree that the order of *mandamus* sought by the applicants in this case should go.

Mandamus granted.

Solicitors: *Blyth, Dutton, Wright & Bennett; Treasury Solicitor.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., WALLER AND O'CONNOR, JJ.)

July 28, 29, 30, 1969

R. v. BRIXTON PRISON GOVERNOR. *Ex parte* KOTRONIS

Extradition—Conviction in foreign country—Absence and lack of knowledge of defendant—Conviction contrary to natural justice—Tender of certificate of conviction—Conclusiveness of certificate.

Extradition—Restrictions against surrender—Fugitive not to be detained or tried for offence other than extradition crime on return—Presumption that foreign government will honour obligation—Extradition Act, 1870, s. 3 (2).

Extradition—Contumacy—Absence of defendant at trial—Extradition Act 1870 (33 & 34 Vict c. 52), s. 26.

The applicant, who was a Greek national and a political opponent of the Greek government, was convicted in 1965 by a Greek court of obtaining money by false pretences (an extraditable offence under the extradition treaty between the United Kingdom and Greece). The conviction had taken place in the applicant's absence and without his knowledge, though a procedure for substituted service had been followed. In the extradition proceedings a duly authenticated certificate of the conviction was tendered to the court.

HELD (per WALLER and O'CONNOR, JJ., LORD PARKER, C.J., dissenting on this point), the certificate was not conclusive and it was possible for the court to look behind it; in the circumstances the conviction was contrary to natural justice and a nullity; and an order for the discharge of the applicant should issue.

Held, further, that the applicant was not entitled to release under s. 3 (2) of the Extradition Act, 1870, since the court would presume that the Greek government intended to honour its obligation under art. 7 of the extradition treaty, whereby

the governments concerned undertook not to detain or try a fugitive who had been returned for an offence other than the offence for which he had been extradited.

Held, further, that the conviction was not for contumacy within s. 26 of the Act.

MOTION by Christos Kotronis, detained in Brixton Prison, for a writ of habeas corpus directed to the governor of the prison, to bring him before the Queen's Bench Division for a warrant of committal issued by a metropolitan magistrate at Bow Street Magistrates' Court pending his surrender to the Greek authorities under the Extradition Act, 1870, to be quashed.

R. A. MacCrindle, Q.C., and L. J. Blom-Cooper for the applicant.

A. R. Campbell, Q.C., and J. M. Cope for the Greek government.

Gordon Slynn for the governor of Brixton Prison and the Secretary of State for Home Affairs.

LORD PARKER, C.J.: This case raises a matter of such importance that in the ordinary way I would prefer to have stated my reasons in writing, particularly as I understand that I differ from my brethren. However, this is a matter of urgency and we are at the end of the term. Accordingly, I will endeavour to state my views shortly.

In these proceedings, counsel moves for a writ of habeas corpus on behalf of the applicant, one Christos Kotronis, who is now held in Her Majesty's prison at Brixton pursuant to a warrant of committal issued by a metropolitan stipendiary magistrate dated 15th July 1969, awaiting his surrender to the Greek authorities pursuant to the Extradition Act 1870. The dates are as follows: on 14th April 1969 the applicant was arrested on the basis that he had been convicted of the crimes of obtaining and attempting to obtain money by false pretences between 27th September 1965 and 19th October 1965 in Athens, within the jurisdiction of Greece. Let me say at once that an attempt to obtain money by false pretences is not an extradition crime, and accordingly that disappeared out of the picture. On 12th May however, the Home Secretary, having received a requisition, required the magistrate to issue a warrant under s. 7 of the Extradition Act 1870, and proceed to consider the matter. The committal proceedings, if I may call them such, took place between 29th May and 15th July and on 15th July the magistrate issued his warrant of committal. The requisition was on the basis of the applicant being a convicted person, and accordingly the enquiry to be made by the magistrate fell to be made under the second paragraph of s. 10 of the Act, which provides:

"In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison but otherwise shall order him to be discharged."

Section 14, providing what documents should be received, states that—

"... foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

Section 15 provides that—

"... certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act if authenticated in manner provided for the time being by law or authenticated as follows . . . (3) If the certificate of or judicial document stating the

fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; . . ."

Now in the present case what was produced before the magistrate was a duly authenticated judgment dated 14th May 1966, and that recited that the court had received evidence from a Japanese importer who alleged that he had bought silk in some form from the applicant for import to Japan, that a bank credit had been opened in Greece and that payment of \$51,000 had been made to the applicant against the bills of lading, whereas the goods when they arrived in Japan consisted of cotton waste and other matter, not silk. It was on that evidence that the court, which was the Athens Misdemeanour Court, on 14th May convicted the applicant of obtaining money by false pretences and sentenced him to three years' imprisonment.

Pausing there, this would appear to be a straightforward case, since the preliminaries to the exercise of jurisdiction by the magistrate were duly complied with, and this was an extradition crime. Further, there was evidence that the applicant was the man referred to in the judgment. Before the magistrate, the main contention of the applicant centred on s. 3 (1) of the Act. It was sought to prove to the satisfaction of the magistrate that the requisition for his surrender was in fact made with a view to try and punish him for an offence of a political character. There is no doubt that the applicant is a man of extreme left-wing political views. He has been described as a passionate democrat, and there is no doubt that not only to the present regime in Greece but to prior governments he has been, to put it bluntly, anathema, and there is evidence—and indeed he said so himself—that while in this country he has been carrying on activities against the Greek government. He is therefore clearly a man liable to be subject to detention, and indeed he has already served three periods of imprisonment, each time without trial, for political reasons. It was natural therefore that the first and main plank before the magistrate was a reliance on s. 3 (1). The magistrate did not accede to that contention, and in my judgment quite rightly, because from *Schtraks v. Government of Israel* (1), it is quite clear, certainly from the speech of VISCOUNT RADCLIFFE, that the two limbs of s. 3 (1) deal first with what one might call a political offence per se, something which is clearly political; and that the second limb deals with an offence which is contrary to statute but which, on its face, it is not of a political character, but which, when one looks at the circumstances, does have a political flavour. In other words, s. 3 (1) deals with the case of a man who is not being imprisoned for an offence, but is going to be detained purely for his political views. That this was not a political offence per se of course is quite obvious. It is an allegation of a pure commercial fraud. In this court that contention has not been pursued by counsel for the applicant, although he did say that he wished to reserve the point.

The second contention raised before the magistrate was based on s. 3 (2), and it was said—and indeed there was evidence to support it—that when the applicant returned to Greece, if he was ordered so to be returned, he was likely to be detained by the military authorities having regard to his political activities and not be imprisoned pursuant to the judgment, or alternatively, that when he had served his sentence under the judgment he would then be detained for his political views. The magistrate again did not accede to that contention, holding that he felt that he was bound to approach the matter on the basis that the Greek government would honour its obligation under the treaty, art. 7 of the treaty amounting to an arrangement of the nature referred to in s. 3 (2) of the Act. That contention has been pursued in this court, albeit as a secondary

point, it being really put on this basis, that s. 3 (2) provides that there must be an effective arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity of returning here, be detained in that foreign State for any offence committed prior to his surrender other than the extradition crime for which he is extradited. Counsel for the applicant says that "by arrangement" there must mean "by effective arrangement" and that today he may well be tried by a court which does not honour that arrangement.

The other contention before the magistrate was that this was a conviction for contumacy within s. 26 of the Act, and that accordingly he could only be extradited on the basis of being an accused person, which is not the procedure invoked in the present case. The magistrate likewise refused to accede to that contention, holding that on the evidence this was not a conviction for contumacy; that it was a final conviction in the sense that if returned to Greece he would go to prison pursuant to that conviction and not, as in some cases of true convictions for contumacy, be tried albeit there had been, as it were, a declaratory judgment in his absence. That again is a point taken as a secondary point before this court.

I mention those matters first because the real point taken before this court is a quite different one, and, as I understand it, a point not urged before the magistrate and not dealt with by him in the notes we have of his judgment. It is this, that while the judgment in the present case was *prima facie* proof of conviction, it is open to the applicant to show if he can that it is a conviction arrived at without jurisdiction or one which these courts would not recognise as having been obtained contrary to the rules of natural justice. It is common ground in the present case that these proceedings were commenced at a time when the applicant had already fled from Greece. According to him—and the magistrate accepted his evidence—he was never informed of any intended prosecution before he left Greece. He was never personally served with the initiating process which has been called a writ, because he had left the country, and accordingly he was never represented, never had an opportunity of defending himself, and indeed never heard that there was a conviction until his sister wrote to him to that effect from Athens in November 1968.

It is an unfortunate state of affairs and one would hope one which rarely occurs, and, if it is, as I think, a matter for the Secretary of State for Home Affairs, it may be that this is a case in which in his discretion he would refuse to allow the applicant to be extradited.

The real question is whether the magistrate or this court has got power to look into the matter. What enabled this unfortunate state of affairs to occur was the provision under Greek domestic law for substituted service. Article 156, which at any rate has been the law since 1950, provides as follows:

"(1) If the person on whom service is to be effected is absent from the place of his residence and is of unknown residence the document shall be handed to the spouse or there being no spouse to one of the parents or brothers or other blood relations or relations by marriage up to the third degree (inclusive) of the person to be served, who are not less than 17 years old and who are not in all evidence mentally sick or in a state of inebriation in the absolute judgment of the serving agent and are not the victims of the offence, when service is intended to be made on the accused or on the party responsible in civil law and vice-versa. As to the rest the provisions contained in paragraph 2 of the preceding article shall apply.

"(2) If there is none of the above, service is effected on the mayor or the president of the commune or the priest of the parish of the last domicile or residence of the person on whom service is being effected . . ."

and so on.

To return to the judgment in the first case, it recites:

"At today's sitting held in open court, the court bailiff on orders of the president called out the name of [the applicant], who failing to appear was tried as if he was present, since he was legally subpoenaed [that is probably better translated as "legally summoned"] . . . Whereas from the receipted writ served by writ server [setting out his name] dated 29th March, 1966 and duly appended to the brief, the [applicant] was legally summoned as being of unknown domicile address and now he is being tried as if he was present . . . In passing judgment as if the [applicant] Christos Kotronis . . . resident at Athens and now of unknown domicile address, was present in court."

There is no doubt, I think, that what happened was that the procedure for substituted service envisaged by art. 156 (2) was at any rate sought to be carried out, the applicant having left the country, and the process server not having found any relations to serve it on. Moreover, it was contended here, although the point was not taken before the magistrate, that the proper procedure for substituted service under domestic Greek law was not in fact complied with. This last point arises in this way. The magistrate was not asked to deal specifically with how the writ had been served, but it did become necessary on one aspect of the case to consider how the judgment had been served, because the judgment should have been served on the applicant. There was a document in the file which shows that the process server in serving the judgment went to an address called 18 Aeolou Street in Athens, and that finding the applicant not there and no relation there on whom to serve the judgment, substituted service was effected on the mayor. Now the applicant in his evidence claimed that he had never lived at 18 Aeolou Street. It may have been a post office address provided by the Japanese importer, I know not, but he did go on to say that he had been born at no. 20 Cosma Melodou, that his family had lived there, that his brothers and sister were there, and indeed the sister who wrote to him in November 1968 was still there. Accordingly, it was urged that that address was his last known place of residence in Athens, and indeed it was the address shown on his identity card, and that accordingly the process server ought to have gone to that address, and if he had he would have found a blood relation on whom to serve the writ. Having got that far and that being based on the findings of the magistrate, it was then urged in this court that we should infer that exactly the same thing happened in the case of the service of the writ, and that accordingly the prerequisite to substituted service on the mayor had not been complied with and accordingly that the court had no jurisdiction.

The argument here is that the court can and should enquire into the validity of a conviction, and that contention is based, broadly speaking, on the following considerations. Counsel for the applicant says in the first instance what is undoubtedly right, that it is a well-known principle of private international law that the courts of this country will not lend themselves either directly or indirectly to enforce either a revenue or, as in this case, a penal law of a foreign State. While he recognises that the legislation dealing with extradition clearly is an exception to that general principle, yet he says that the very presence of that principle of private international law should make us approach the matter by giving a very strict construction to the word "conviction" where it appears in the Act. Secondly, he points out that, in the case of a civil judgment of a foreign State, it is clear that in such circumstances as these—when I say "such circumstances as these" I mean a case in which a man has never had an opportunity to defend himself—the courts of this country would not recognise the judgment. There is considerable authority on the matter, but I think it is sufficient to refer

to three short passages. The first is in *CHESHIRE'S PRIVATE INTERNATIONAL LAW* (7th Edn.) at p. 576, where this appears:

"The English courts are reluctant to criticise the procedural rules of foreign countries on this matter and will not measure their fairness by reference to the English equivalents, but, if the mode of citation has been manifestly insufficient as judged by any civilised standard, they will not hesitate to stigmatise the judgment as repugnant to natural justice and for that reason to treat it as a nullity."

The second is a passage in the judgment of ATKIN, L.J., in *Jacobson v. Frachon* (1). In his judgment, ATKIN, L.J., in dealing with the well-known case of *Pemberton v. Hughes* (2), and the judgment in that case of SIR NATHANIEL LINDLEY, M.R., said:

"The Master of the Rolls seems to prefer, and I can quite understand the use of the expression 'contrary to the principles of natural justice'; the principles it is not always easy to define or to invite everybody to agree about, whereas with our own principles of justice we are familiar. Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

Finally, there is a passage at the end of the judgment of VAUGHAN WILLIAMS, L.J., in *Pemberton v. Hughes* itself, a passage which comes very near the position of the present case. He said:

"The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person, must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid as, for instance, a case where there had been not only no service of process, but no knowledge of it."

It is I think clear that if that principle in relation to the recognition of foreign civil judgments applies, this is clearly a case on the findings of the magistrate where this court would not recognise the judgment. Counsel for the applicant naturally says that if that is the principle in civil cases, how much more should that be the principle in a criminal case where the liberty of the subject is involved.

Thirdly he says that it is always open in English law for the courts to enquire whether a determination of a court or a tribunal, otherwise valid on its face, is merely in fact a purported determination, and that even where the Act expressly provides that the determination shall not be called in question in any court of law. For that proposition he cites the recent case of *Anisimic, Ltd. v. Foreign Compensation Commission* (3). The argument then proceeds, that granted that the answer to the question which we have to determine depends on the true construction of the words in the Act of 1870 and the Order in Council and the treaty, read together, yet the legislation must, and in particular the word "conviction" must, be construed against the background of these considerations; whereas he says that the Act, treaty and Order in Council, no doubt

(1) (1927), 133 L.T. 386.

(2) [1899] 1 Ch. 781.

(3) [1969] 1 All E.R. 208.

expressly override and afford an exception to the first principle that this court will not indirectly enforce a penal statute, yet the legislation does not either expressly or impliedly override the other principles to which he referred.

Now the answer made by the Greek government, through their counsel, and by the Home Secretary, through his counsel, is simply this: those principles referred to by counsel for the applicant have really nothing to do with the matter now under consideration which depends purely on the construction of the Act, the treaty and the Order in Council, read together. There is no direct authority on this point, although it is to be observed that this sort of question has already been raised twice, once in the Divisional Court in the case of *Re Caborn-Waterfield* (1), and again in the Divisional Court, and also the House of Lords, in the recent case of *Athanassiadis v. Government of Greece* (2). In neither of those cases was it necessary to decide this point, and indeed in both those cases the applicant in question had had a full opportunity of defending himself and of appearing before the court, but chose not to appear. In *Re Caborn-Waterfield*, the Attorney-General appeared on behalf of the Home Secretary and the argument, which has been adopted by counsel for the Greek government and by counsel for the governor of Brixton Prison and the Secretary of State for Home Affairs reads thus:

"If the argument for the applicant based on English notions of substantial justice is right, it would mean that in every case where extradition is sought the magistrate would be under a duty to inquire into the foreign procedure and satisfy himself that it was in accordance with British principles of natural justice. But the provisions of the Extradition Act, 1870 are clear and precise. There is no discretion such as that given by section 10 of the Fugitive Offenders Act, 1881 . . . [and I will add there now under s. 8 of the Fugitive Offenders Act 1967]. In the absence of such a discretion, the magistrate is bound by the Act and may not inquire into the foreign procedure; under s. 10 of this Act he must commit on production of the proof required. Any question of contravention of our notions of substantial justice is a matter for the executive which has a discretion to refuse to surrender. Furthermore, the applicant's proposition would lead to the strange result that, while an accused or a convicted person might be extradited, those countries where the Code Napoleon is in force would experience a real difficulty in obtaining the extradition of a person twice condemned in default."

As I have said, the court found it unnecessary to decide in that case—similarly in *Athanassiadis v. Government of Greece* (2)—whether that contention advanced by the Attorney-General was or was not correct.

Accordingly, it does fall now to this court to decide the point which was left open in those two cases, and for my part I have come to the conclusion, although with some reluctance, having regard to the extreme facts revealed in the present case, that the contentions raised on behalf of the Greek government and the Secretary of State for Home Affairs are correct. We are dealing here with a treaty made as a bargain between friendly States by which in certain circumstances one State undertakes to return the fugitive criminal of the other State. A treaty will not be made unless this country is satisfied that the standard of justice administered in the State in question is acceptable and justifies the entering into the bargain. If at any time the standard of justice of the other

(1) 124 J.P. 316; [1960] 2 All E.R. 178; [1960] 2 Q.B. 498.

(2) Ante p. 577; [1969] 3 All E.R. 293.

State falls short of what can be expected, according to our notion of the administration of justice, then it is open to this country on six months' notice to terminate the treaty. Moreover, in any individual case it is open to the Secretary of State for Home Affairs in his discretion to refuse to set the requisition in motion or to refuse to return the prisoner after committal by the magistrate. Again, the object of the bargain, as I see it, is reciprocity, and this cannot be achieved if each contracting party has the right to enquire into the proceedings in the courts of the other contracting party to see whether its notions of natural justice have been complied with.

It is, I think, against that background rather than against the background of the principles enunciated by counsel for the applicant that this matter has to be judged, and one looks at once therefore at the Act and the treaty. If I may take the treaty first, art. 8 deals with the requisition for extradition and it provides, so far as it is relevant here:

"8 . . . If the requisition relates to a person already convicted, it must be accompanied by a copy of the judgment passed on the convicted person by the competent Court of the State that makes the requisition for extradition . . .

"11 The extradition shall take place only if the evidence be found sufficient, according to the laws of the State applied to, either to justify the committal of the prisoner for trial, in case the crime has been committed in the territory of the same State, or if extradition is claimed in respect of an offence of which the fugitive has been already convicted, to prove that the prisoner is the person convicted, and that the crime of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the State applied to.

"13 Warrants, depositions, and affirmations, issued or taken in the dominions of one of the High Contracting Parties, and copies of such documents as well as certificates or judicial documents stating the fact of a conviction shall be admitted as valid evidence in the proceedings taken in the dominions of the other party, if they [are duly authenticated]."

Passing to the Act, one finds—and I have really read the passage already—in the second paragraph of s. 10 that the police magistrate is to commit him to prison with a view to extradition if, in the case of a fugitive criminal alleged to have been convicted of an extradition crime, evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime. It seems to me that in the context of extradition, all the magistrate is to consider is whether the prisoner before him is the person referred to in the conviction, secondly whether he was convicted of an extradition crime, and thirdly whether there is anything in s. 3 of the Act which prevents extradition. I appreciate of course—and this is if I may put it a "bull" point for counsel for the applicant—that whereas in s. 5 there is a reference to the Order in Council being conclusive evidence of the arrangement referred to in s. 3 (2), yet when one comes to s. 10 and indeed to s. 14 there is no express provision that the authenticated document regarding the conviction is of itself conclusive evidence. I appreciate that, but looking at the general scheme of the treaty and the Act it seems to me that it is conclusive at any rate in the sense that the magistrate and indeed this court cannot enquire into the jurisdiction which resulted in the conviction or whether the conviction has been arrived at according to our notions of natural justice. I confess also that the practical aspect of the matter influences me in coming to this conclusion. In the case of a request to extradite an accused person, the

magistrate does not have to find anything as a fact, nothing has to be proved before him. He merely has to look at the evidence produced and see whether it is evidence which is sufficient to justify the committal for trial of the prisoner, as if the crime had been committed in this country. On the other hand, in the case of a request to extradite a convicted person he can only commit with a view to extradition if something is "proved". I see great practical difficulties therefore if it is proper for the magistrate and this court to go behind, as it were, the judgment in this case, the conviction, and see whether it is, as in the case of civil judgments, a nullity or an invalid judgment. A dispute may arise in regard to service—not this case—there may be a document akin to the one in this case in relation to the service of the writ. It is certified that the process server served the particular applicant; the applicant then exercises his right of giving evidence before the magistrate and says "That process server is lying or he is mistaken; it was not served on me". For my part, I do not see how a magistrate can, if he is entitled to enter on these enquiries, ever properly come to the conclusion that the conviction is proved to be valid, because it is only if it is proved to be valid, proved to be a true conviction and not a purported conviction, that he can commit with a view to extradition. I can think of many other examples in which it would be quite impossible for a magistrate, if he is entitled to enquire into these matters, to come to any proper decision in the matter. As I have said, I think that under this procedure all that is left to the magistrate to consider is whether there is a duly authenticated judgment; whether the man before him is the person referred to in that judgment; whether he has been convicted of an extradition crime; and whether s. 3 affords any ground for refusing to commit him. Accordingly, in my judgment, although I say with some reluctance because this is an extreme case, it is for the Secretary of State for Home Affairs if he thinks it right and not for this court to refuse extradition. That is the main point and on that I am against the applicant.

The other points can be dealt with very shortly. It is said that there is today no effective arrangement in force of the kind envisaged in s. 3 (2). At the same time it is admitted that art. 7 of the treaty does on its face afford the applicant rights in Greece, and for my part I feel constrained to hold, as did the magistrate, that there being those rights, it is not to be assumed that they will not be exercised. Finally, in regard to the contention that this really was a judgment for contumacy, it is in my judgment clearly a final judgment, as a result of which this man will go straight to prison to serve three years' imprisonment if he is returned. It is not therefore as it seems to me a conviction for contumacy as described in the speech of VISCOUNT DILHORNE in the *Athanassiadis* case (1), and accordingly agree with the magistrate on that point. In the result, I have come to the conclusion that this application should be dismissed.

WALLER, J.: On the points raised before the magistrate and on the last two points dealt with by LORD PARKER, C.J., I agree and would not wish to add anything. But I find myself in disagreement with LORD PARKER, C.J., on the main point in this case, namely, the question of whether or not it is possible for this court to look behind the certificate of conviction. Like LORD PARKER, C.J., I would have preferred to put my reasons in writing, but this being a matter in which the liberty of the subject is concerned, the decision is being given now, and I will endeavour to state my reasons as shortly as I can. The section with which we are concerned has already been read by LORD PARKER, C.J. It is s. 10 of the Extradition Act 1870, and the second paragraph, if I may read it again provides:

(1) Ante p. 577; [1969] 3 All E.R. 293.

"In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as . . . would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison . . ."

The point which counsel for the applicant has taken on this was not taken in the court below, but it seems to me that having regard to the function of this court, which was expressed by VISCOUNT RADCLIFFE in *Schtraks v. Government of Israel* (1) where he said:

"I think it clear that in habeas corpus proceedings which arise out of a committal order under the Extradition Act, 1870, the court does not re-hear the case that was before the magistrate nor does it hear an appeal from his order. Its function, apart from considering any issue raised as to the offence charged being a political one, is to see that the prisoner is lawfully detained by his gaoler."

if the true position be that there is in the eyes of English law no conviction, then the applicant is not lawfully detained by his gaoler. The effect of the magistrate's decision in a case of this sort under that part of the section is that, if the police magistrate commits him to prison, he will ultimately go without further trial to serve the sentence which was imposed on him, in this case a sentence of three years' imprisonment. It would be a strange thing, in my view, if this court were satisfied that the proceedings were contrary to natural justice but at the same time found itself compelled in effect to cause a sentence of imprisonment to be carried out. Of course, if the words of the Act compel this court to do so, it must do so. But in my view the matter must be carefully considered before that conclusion must be arrived at.

The only facts which it is necessary to repeat are these: that in 1965 the alleged offence was committed and the applicant left Greece; in 1966 the conviction with which we are now concerned took place in the applicant's absence. There had been substituted service. It is unnecessary to go into the details of that, but the fact is, as accepted by the magistrate, that the notice of those proceedings never reached the ears of the applicant, and indeed he did not know that he had been convicted until some 2½ years later, in November 1968. If those facts are right, it would seem that there was a breach of an elementary principle in that the applicant did not know of the charge against him and had no opportunity for answering it.

Counsel for the applicant has addressed this court on the principles which would be adopted in non-criminal cases, and it is quite clear from those cases which have already been referred to by LORD PARKER, C.J., that in a non-criminal case the background could be investigated. The passage from VAUGHAN WILLIAMS, L.J., in *Pemberton v. Hughes* (2) has already been mentioned by LORD PARKER, C.J., but there is also one passage in *Jacobson v. Frachon* (3) which I desire to cite. In that case ATKIN, L.J. also said:

"A court of competent jurisdiction, as I have said, may very well, either in accordance with its rules or in violation of them, refuse a substantial hearing to the party, and, if so, it appears to me that the judgment would be invalidated on the ground that it was contrary to natural justice for the reasons I have already to give."

(1) [1962] 3 All E.R. 529; [1964] A.C. 556.

(2) [1899] 1 Ch. 781.

(3) (1927), 138 L.T. 386.

So in that case, ATKIN, L.J., was saying that the judgment would be invalidated. And in the recent case of *Ridge v. Baldwin* (1) it was held by a majority of the House of Lords that where a decision had been made which was contrary to natural justice, the decision was a nullity, and the position is perhaps shortly stated in the speech of LORD HODSON where he said:

"In all the cases where the courts have held that the principles of natural justice have been flouted I can find none where the language does not indicate the opinion held that the decision impugned was void. It is true that the distinction between void and voidable is not drawn explicitly in the cases, but the language used shows that where there is a want of jurisdiction as opposed to a failure to follow a procedural requirement, the result is a nullity."

So it is in my view clear that if these were merely civil proceedings in this country, the fact that the applicant had not been served and had no opportunity of meeting the charge against him, would make the subsequent proceedings a nullity. Counsel for the applicant submitted that at common law the well-known principles were that the English courts would not recognise that persons' rights would be affected by a foreign judgment where that was based on a foreign penal statute or where it was given without jurisdiction or where it contravened the principles of natural justice. He submitted that the only effect of the passing of the Extradition Act 1870 was to make it possible where treaties had been negotiated to enforce foreign penal statutes and he submitted that the passing of the Act did not affect the principles insofar as they related to judgments either without jurisdiction or contrary to natural justice.

As I have already mentioned, in this case there was substituted service, and LORD PARKER, C.J., has read art. 156, which is a provision under Greek law allowing substituted service when personal service is impossible. Service is required first of all to be on the accused person personally, if that fails then on a relative, if that is not possible then on the mayor of the town where the accused lives. For myself I find it difficult to comprehend the notion of a criminal charge followed by conviction when neither the charge nor the conviction are made known to the accused. Even though it is contrary to the English notion, I do not have the same difficulty in comprehending the case of a criminal charge and conviction in the absence of the accused but where steps have been taken that will probably bring the charge to the attention of the accused. There is in my view nothing in art. 156 or the method of substituted service provided by art. 156 which necessarily involves a proceeding which is contrary to natural justice because the charge may in fact be brought to the attention of the accused. In the present case, however, the evidence shows that the applicant did not himself know of the charge and did not even know of the conviction for some considerable time afterwards. In these circumstances, if this court is entitled to go behind the certificate of conviction to enquire whether in truth there was a conviction or whether, because it infringed the principle that a man should be given an opportunity of meeting a charge, it was a nullity, if it were possible I would unhesitatingly say that this was a case where the applicant did not know the charge, had no opportunity of meeting it, and, therefore, the purported conviction, being contrary to natural justice, was a nullity.

Both counsel for the Secretary of State for Home Affairs and counsel for the Greek government say the certificate was conclusive. Counsel for the Secretary of State for Home Affairs goes further and says that the words in s. 10—
" . . . if such evidence is produced as . . . would, according to the law of

(1) 127 J.P. 295; [1963] 2 All E.R. 66; [1964] A.C. 40.

England, prove that the prisoner was convicted of such crime . . . " have to be interpreted in the light of what would be required to prove a conviction in the criminal courts of England, and he refers to the Evidence Act 1851 and to other subsequent Acts which make it possible to prove a conviction in the English courts without producing the whole record but merely producing a certificate from the officer of the court. He submits that those certificates are conclusive evidence. It was also argued that there is a distinction between this Act and s. 8 (3) of the Fugitive Offenders Act 1967, where specific provision is made enabling the court to order the person to be discharged from custody where the offence is of a trivial nature, where there has been delay or where the accusation is not made in good faith. It was submitted that that distinction shows that there is no kind of discretion in this case. Counsel for the Secretary of State for Home Affairs, also points to the difficulties which might arise if it were possible to go beyond the certificate of conviction, difficulties which have already been adverted to by LORD PARKER, C.J.

On the other hand, counsel for the applicant drew attention to the sections of the Extradition Act which LORD PARKER, C.J., has already mentioned, namely s. 5 and s. 14. Section 14 provides:

"Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

Counsel says that that is merely *prima facie* evidence, albeit very strong *prima facie* evidence, of a conviction, and contrasts that with the words in s. 5 of the Act:

" . . . An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act . . . "

and he says that if the Act intended a certificate of conviction to be conclusive evidence it would have said so. He submits that, although it is strong *prima facie* evidence, it would be wrong to treat it as conclusive because if that were so it would be impossible to interfere with a case where a judge had been bribed or where there had been a conviction without jurisdiction. I have come to the conclusion that those arguments are right. I do not find the difficulties with which a magistrate might be faced as being sufficient to warrant taking a different view. This case before this court is an exceptional case. This point has been raised on two previous occasions in cases which might occur more frequently, but this one is a very exceptional case and one which is unlikely to arise very frequently. It does not offend me that if it did arise again the magistrate would have to make a similar investigation, because if an offence has been committed, if a conviction has been obtained, which is contrary to the elementary rule of natural justice, it would not be right for such person to be extradited under this section. Accordingly, I have come to the conclusion that this certificate is not conclusive evidence of the conviction, but it is possible for this court to go behind it, and that while the circumstances in which any investigation behind the certificate obviously must be rare, where there is a breach of natural justice such as occurs in this case this court can look behind it, and if there is that breach refuse to allow the applicant to be committed in accordance with s. 10. I would therefore be in favour of allowing this application.

O'CONNOR, J.: I agree with the judgment delivered by WALLER, J., and it is only because the court is not unanimous that I add a few words of my

own. The submissions made by counsel for the Secretary of State for Home Affairs and counsel for the Greek government necessarily involve the proposition that the certificate of conviction, as it has been called, is conclusive evidence before the magistrate, and that there is no power in the magistrate to examine its nature other than to consider whether the crime of which it is said the applicant has been convicted is an extradition crime and, in accordance with the definition in s. 26 of the Extradition Act 1870, to enquire whether the conviction is really a conviction for contumacy; it will be seen that those enquiries at least can and must be made. In his submission, counsel for the Secretary of State for Home Affairs pointed to the distinction between the Extradition Act 1870 and parallel jurisdiction under the Fugitive Offenders Act 1967; he said that the power given under s. 8 of that Act was not to be found in the Extradition Act 1870. He submitted that if it was right that under the Extradition Act 1870 the court could not interfere where the accusation was not made in good faith it was no more striking that the court could not interfere in cases where English standards of natural justice were violated. For my part, I am quite unable to accept that if a true case of bad faith were raised the courts in this country should be held powerless by reason of s. 10 of the Act of 1870 to enquire into it and, where needed, give relief. Take a case where a man has never been convicted at all—and this does not require any necessary fraud on the part of a friendly government; it may only require the suborning of an official—and a bogus certificate of conviction, authenticated fraudulently, is produced. If evidence were raised that that was the true position I would regard it as quite wrong to find myself bound by anything in s. 10 of the Act of 1870 and have to say that it would not be competent for the courts in this country to go behind the certificate and give relief. For that reason, among others, I have concluded that the certificate of conviction, properly authenticated, is not conclusive, and I am fortified in that view by the wording of s. 10 of the Act. It has been read and I need not read it again. What is required is if such evidence is produced as would, according to the law of England, prove that the prisoner was convicted of such crime. "Evidence" seems to me to mean something beyond the certificate of conviction, properly authenticated. I contrast, as have WALLER, J., and LORD PARKER, C.J., the words of s. 5 of the Act.

Once it is permissible for the court not to regard the certificate of conviction as conclusive evidence, then it seems to me that the magistrate can, and in this case should (if he had been asked) and this court can and will, look at the main point which is being submitted on behalf of the applicant. On that point I am in agreement with the submission made by counsel for the applicant, as so succinctly set out in the judgment delivered by LORD PARKER, C.J., and in the judgment of WALLER, J. I agree with those arguments and I for my part am satisfied that this conviction is, according to English law, one which has been obtained in circumstances which are a clear breach of the rules of natural justice, as I believe the courts of this country should apply them, and being so it is in my judgment a nullity, and there are no grounds for ordering the detention of the applicant. I would allow the application.

Application granted.

Solicitors: *Lawford & Co.; Bennett, Kaufman & Seigal* (for the Greek Government).

T.R.F.B.

LEEDS ASSIZES

(VEALE, J.)

February 5, 6, 7, 10, 11, 1969

R. v. BASHIR AND ANOTHER

Criminal Law—Rape—Defence—Consent—Evidence of previous intercourse with complainant—Allegation of prostitution.

On a trial for rape where the defence of consent is set up evidence of previous sexual intercourse between the complainant and the accused is admissible, the fact of such intercourse being relevant to the question of consent, but evidence of sexual intercourse between the complainant and other men is not admissible, including acts of familiarity leading to an act of intercourse. Where the defence allege that the complainant is a prostitute evidence that she is of notoriously bad character for chastity is admissible, and also evidence of acts of prostitution which form the ground on which the allegation of prostitution is based.

TRIAL of the defendants, Mohammed Bashir and Mohammed Manzur on charges of rape, it being alleged that they had sexual intercourse with one Maria Zahra without her consent.

V. R. Hurwitz for the Crown.

G. Baker for Bashir.

A. E. Hutchinson for Manzur.

VEALE, J.: The complainant in this case, Maria Zahra, was cross-examined by counsel for the accused Bashir with a view to establishing, inter alia, (i) that she was a common prostitute; (ii) that she had sexual intercourse with a person not the accused; (iii) that she had accosted another man inviting sexual intercourse for money; and (iv) that she had made various statements to two other men which might tend to show that she was a common prostitute. When one of these other men came to give evidence the prosecution objected to a question by the defence and I was invited to rule.

It is quite clear that evidence is not admissible to contradict answers given on cross-examination to credit. The borderline of cross-examination to credit is often very hard to draw, but as applied to cases of rape there is no doubt that while the complainant can be contradicted if she has denied having previous sexual intercourse with the accused, she cannot be contradicted if she has denied sexual intercourse with another man. Previous intercourse with the accused is, one would think, relevant to the question of consent although sexual intercourse with other men is not. I therefore hold in the first place that specific acts of sexual intercourse with other men are inadmissible in chief. I further rule that this includes acts of familiarity leading to an act of sexual intercourse. But that is not the whole picture. There is a difference between the woman who has acts of sexual intercourse with men and a prostitute who regularly sells her body. It has been held that evidence may be given that a woman complainant is of notoriously bad character for chastity. I have not had the opportunity of looking at any authority other than *R. v. Clay* (1), which was heard before PATTESON, J., at the Shrewsbury Assizes in March, 1851. In that case a police constable was permitted to give evidence that 20 years previously he had seen the prosecutrix on the streets of Shrewsbury as a reputed prostitute.

I have also been referred to *R. v. Greatbanks* (2) which was heard before ELWES, J., at the Central Criminal Court in April, 1959. In that case the

(1) (1851), 5 Cox C.C. 146.

(2) [1959] Crim. L.R. 450.

defendant was indicted with rape. The defence was that the prosecutrix had consented to the act of sexual intercourse. The prosecutrix denied consent, and the question arose whether witnesses could be called by the defence to show that the prosecutrix was a woman of notoriously bad character for want of chastity or common decency. Counsel for the defendant submitted that such evidence was admissible and cited various cases. Counsel for the prosecution, submitting that the evidence was inadmissible, cited further cases. It was held that the evidence was admissible; in a case other than rape such evidence could clearly not be admissible; in rape cases, however, special rules applied; it was certain that evidence of intercourse with named men would not be admissible in a rape case, but evidence showing that the woman was a prostitute, or, as in that case, that she was a woman of loose character or notorious for want of chastity or indecency was, on the authorities, admissible; and, therefore, the defence was allowed to call the evidence.

I notice that, in the commentary by the editors on *R. v. Greatbanks*, reference is made to the judgment of KELLY, C.B., in *R. v. Holmes* (1), in which the Chief Baron expressly pointed out that "evidence showing the prosecutrix to be a common prostitute . . . has long been held material". The effect of a complainant being a prostitute was in his view relevant to the issue of consent, and was, therefore, relevant to the subject-matter of the indictment or proceeding.

What then is the permissible evidence-in-chief directed to the issue of prostitution? Is it merely "I know her to be a prostitute" or can a witness add "because of such and such an incident"? I have been referred to no authority on this point, although one is aware of the limitations on the evidence of a witness who says he is not prepared to believe a man on his oath. I think that to apply this rule to the present situation is to add an artificiality which any jury, at any rate, would find most difficult to follow. In the absence of any authority which compels me to hold that the witness's reason for saying that the complainant is a prostitute cannot be given I decline to introduce this artificiality. I hold, therefore, that a defence witness may say—of course, after a proper foundation in cross-examination of the complainant has been laid, as it has in this case: "I say she is a prostitute because of so and so", provided that the evidence is directed to prostitution as opposed to mere sexual intercourse. I emphasise that this does not mean that a witness can say: "I say she is a prostitute because I had sexual intercourse with her" and no more. If the witness says: "She offered herself to me for money", I think he is entitled to do so.

There is a further point. Section 4 of the Criminal Procedure Act, 1865, provides:

"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony does not . . . admit that he has made such statement, proof may be given that he did in fact make it. But before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

I hold that in the circumstances of this case a defence witness, again a proper foundation having been laid, is entitled to contradict the complainant as to what she denied having said. In the circumstances of this case I think the alleged statement was relevant to the subject-matter of the indictment, namely

the issue of consent. In any event, on this point I think that I have some discretion as to the subject-matter of the indictment and I exercise my discretion by allowing such evidence accordingly.

Ruling accordingly.

Solicitors: *M. D. Shaffner*, Wakefield; *Wright & Wright*, Keighley; *R. S. Spencer, Alexander & Co.*, Bradford.

G.F.L.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS AND KARMINSKI, L.JJ., AND LAWTON, J.)

July 3, 1969

R. v. BEBBINGTON

Criminal Law—Appeal against sentence—Committal for sentence to quarter sessions—Order for return to Borstal—No right of appeal to Court of Appeal—Criminal Justice Act, 1961, s. 12 (1) (a)—Criminal Appeal Act, 1968, s. 10 (3) (b).

By s. 12 (1) of the Criminal Justice Act, 1961: "Where a person sentenced to Borstal training—(a) being under supervision after his release from a Borstal institution . . . is convicted, whether on indictment or summarily, of an offence for which the court has power, or would have power but for the statutory restrictions upon the imprisonment of young offenders, to pass a sentence of imprisonment, the court may, instead of dealing with him in any other manner, order that he be returned to a Borstal institution."

By s. 10 (3) of the Criminal Appeal Act, 1968: "An offender dealt with for an offence at assizes or quarter sessions in a proceeding to which sub-s. (2) of this section applies may appeal to the Court of Appeal against sentence in any of the following cases . . . (b) where the sentence is one which the court convicting him had not power to pass . . ."

Where an offender is convicted of an indictable offence at a magistrates' court and committed to quarter sessions for sentence, and quarter sessions make an order, under s. 12 of the Criminal Justice Act, 1961, that the offender be returned to a Borstal institution, as distinct from passing a new sentence of Borstal training, there is no right of appeal against sentence to the Court of Appeal, since the sentence is one which quarter sessions could have passed, and, accordingly, s. 10 (3) (b) of the Criminal Appeal Act, 1968, does not apply.

APPLICATION for leave to appeal against sentence.

On 27th December 1968 the applicant, Gordon Bebbington, was convicted at Stockport Magistrates' Court of eight offences, viz.: (i) failing to stop after an accident; (ii) fraudulent use of vehicle registration plates; (iii) fraudulent use of vehicle excise licence; (iv) shopbreaking and larceny; (v) receiving; (vi) driving without due care and attention; (vii) possessing no driving licence; and (viii) possessing no policy of insurance. He was committed to Lancashire County Quarter Sessions for sentence under s. 29 of the Magistrates' Courts Act 1952 in respect of offences (iv) and (v) and under s. 56 of the Criminal Justice Act 1967 in respect of the motoring offences (nos. (i) to (iii) and (vi) to (viii)). On 8th January the deputy chairman sentenced him to one day's detention in respect of offences (i), (ii), (iii) and (viii); to be conditionally discharged for 12 months in respect of offences (vi) and (vii); and to be returned to Borstal in respect of offences (iv) and (v). He applied for leave to appeal against sentence. The facts are set out in the judgment of the court.

The applicant did not appear.

LAWTON, J., delivered the judgment of the court: The court has had to concern itself with the problem whether the applicant has in law any right of appeal to this court. The consideration of that question has led to the discovery of a gap in the law relating to appeals.

The matter arises in this way. The offences in respect of which the applicant was committed to the Lancashire County Sessions were these: (i) failing to stop after an accident; (ii) fraudulent use of vehicle registration plates; (iii) fraudulent use of vehicle excise licence; (iv) shopbreaking and larceny; (v) receiving; (vi) driving without due care and attention; (vii) no licence; and (viii) no insurance: a mixed bag of offences, some of which were indictable and some of which were summary. The sentences passed at the Lancashire County Sessions were as follows: for the summary offences, in respect of which there had been a committal under s. 56 of the Criminal Justice Act 1967, sentences such as a day's detention or a conditional discharge, all being sentences which the magistrates could have passed. In respect of the two serious indictable offences (namely shopbreaking and larceny and receiving) the learned deputy chairman made an order that the applicant should be returned to Borstal. Such an order was made pursuant to the provisions of s. 12 of the Criminal Justice Act 1961, and it is in respect of that order of return to Borstal that the applicant is aggrieved.

The problem now is: Can this court consider his application having regard to the provisions of s. 10 of the Criminal Appeal Act 1968? Section 10 (2) provides:

"The proceedings from which an appeal against sentence lies under this section are those where an offender convicted of an offence by a magistrates' court—(a) is committed by the court to be dealt with for his offence at assizes or quarter sessions; or (b) having been made the subject of a probation order or an order for conditional discharge or given a suspended sentence, appears or is brought before a court of assize or quarter sessions to be further dealt with for his offence."

The next relevant provision of the Criminal Appeal Act 1968 is s. 10 (3), which is in these terms:

"An offender dealt with for an offence at assizes or quarter sessions in a proceeding to which sub-s. (2) of this section applies may appeal to the Court of Appeal against sentence in any of the following cases:—(a) where either for that offence alone or for that offence and other offences for which sentence is passed in the same proceeding, he is sentenced to imprisonment for a term of six months or more; [the applicant was not sentenced to a term of imprisonment of six months or more] or (b) where the sentence is one which the court convicting him had not power to pass . . ."

It is that paragraph of the section which raises the problem in this case: had the justices who committed him for sentence jurisdiction, pursuant to the provisions of s. 12 of the Criminal Justice Act 1961, to make an order of return to Borstal? If they had, the applicant has no right of appeal. As for the applicant, who was 17 and out on licence from a Borstal institution, all he would be likely to understand would be that the deputy chairman had said that he had to lose his liberty and go back to a Borstal institution. He might not have appreciated the difference between a new Borstal sentence and an order for return to Borstal; in either case he would be losing his liberty. But in one case (the making of a new order) he would have had a right of appeal to this court, because magistrates' courts have no jurisdiction to make orders of Borstal training; in the other if the justices had had jurisdiction to make an order returning him to Borstal, he would have had no right to appeal to this court, having been committed to

sessions for sentence. The position would have been different if the justices had committed him to sessions for trial.

I turn, therefore, to s. 12 of the Criminal Justice Act 1961 to see what the position is under that Act; and, in the judgment of this court, there is no doubt at all that the justices could have ordered his return to Borstal. It follows that, because first the justices had committed him for sentence and not for trial and, secondly, the deputy chairman (probably in mercy to the applicant) had made the order in the terms he did, the applicant has no right of appeal. If the justices themselves had ordered him to return to Borstal, he would have had a right of appeal to quarter sessions pursuant to the provisions of s. 83 of the Magistrates' Courts Act 1952. The applicant must think that loss of liberty depends a great deal on what words are used to bring it about. Why this gap in the law relating to appeals has been left this court does not know. It is disturbed to find that there is such a gap.

There is only one consolation arising out of this unfortunate matter, and that is this: the court has looked at the facts and at the applicant's record. It is satisfied that in the circumstances of this case no injustice has been done. The sentence of return to Borstal was clearly right. Perhaps this application has served a useful purpose as it may lead those presiding at quarter sessions and assizes to appreciate the consequence of using particular forms of words when passing sentences of Borstal training. The application is refused.

Application refused.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS AND KARMINSKI, L.JJ., AND LAWTON, J.)

July 3, 1969

R. v. SHIRLEY

Road Traffic—Sentence—Long periods of disqualification—Desirability of applications for restoration of licences in case of a number of disqualifications imposed by different courts being dealt with by one court.

Observations on the undesirability of long periods of disqualification for road traffic offences and on the desirability of legislation being introduced to enable applications for restoration of licences, when a number of periods of disqualification have been imposed by different courts, to be dealt with by one court.

APPEAL by Leroy Frank Shirley against sentences passed on him at North East London Quarter Sessions after he had pleaded guilty to four counts of an indictment—count 1, larceny (three years' imprisonment); count 2, larceny (two years consecutive); count 3, taking and driving away a motor vehicle without consent (12 months consecutive; disqualified from driving for ten years); and count 4, driving whilst disqualified (12 months' imprisonment consecutive; disqualified for 12 months consecutive).

S. A Goldstein for the appellant.

The Crown was not represented.

SACHS, L.J., in the course of delivering the judgment of the court said that in all the circumstances, and having regard to the appellant's age, the term of imprisonment would be reduced from seven years to four years, and added: There is, however, another matter which has given this court considerable concern. As regards the driving while disqualified quarter sessions imposed a further disqualification of 12 months consecutive. That, of course, was a sentence that they were bound to pass, but when it came to the taking and driving away a motor vehicle, although it was open to quarter sessions whether or not to impose any further disqualification, a ten years' disqualification was ordered. This court has been informed that at that time the appellant was under a series of disqualifications consecutive to each other, including a five years' disqualification imposed in 1965, which cumulatively ran already to something like June 1974. It was on top of those disqualifications and on top of the 12 months consecutive on count 4 that this further disqualification from driving for ten years was imposed.

This court desires to emphasise a point, which it is thought has already previously been mentioned in other Divisions. Long periods of disqualification from driving may prove a very severe handicap to a man when he comes out of prison and desires to pursue a different type of life to that which has led him into that prison. Such periods of disqualification may shut out a large sector of employments, especially in certain areas. Moreover, if the length of disqualification is overlong and amounts to a period such as a decade, the position may well seem hopeless to the man and that of itself sows the seeds of an incentive to disregard the law on this point. However wrong such an attitude may be, it springs from a human factor which it is wise to take into account. In those circumstances the court has decided that the disqualification of ten years consecutive on count 3 be quashed; there is no point in substituting a disqualification of one year to run concurrently with the one year's disqualification under count 4.

There remains to mention one further point which has concerned each of the members of this court individually from time to time. That is the machinery by which, when there has been a number of disqualifications by various courts totalling very long periods, the absurd position which then may arise can be alleviated. It appears (so far as the information at present put before the court is concerned) that under s. 106 of the Road Traffic Act 1960 one has to go round from court to court in turn—however distant from each other—in order to procure a restoration of a licence in circumstances when this happens to be the best course to take. In this particular case the main sentence of disqualification is the one of 1965 from Essex Quarter Sessions, but there are other disqualifications as well. This court is not prepared to make recommendations on the question of the restoration of the appellant's licence in the particular circumstances because it may not know all the facts. On the other hand, this court deems it right to call attention to the problem that there is no machinery for any single court to review a whole series of disqualifications which have totalled up to great length, and that this seems to be a defect in the law.

Sentences varied.

Solicitors: *Douglas Wiseman, Karsberg & Collyer.*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND COOKE, J.J.)

July 7, 1969

DONEGANI v. WARD

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Provision of specimen—Breath test—Provision of specimen of breath “there or nearby”—Matter of degree and fact—Road Safety Act, 1967, s. 2 (1).

By s. 2 (1) of the Road Safety Act, 1967: “A constable in uniform may require any person driving . . . a motor vehicle on a road . . . to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body . . .”

Whether or not the place where the requirement to take a breath test under s. 2 (1) of the Road Safety Act, 1967, is “there or nearby” [to the place where the driving or attempting to drive has taken place] is a matter of degree and of fact for the justices who try the case. The word “nearby” is used in a purely geographical sense and was intended to cover a case where it was necessary to administer the test on a lay-by rather than on a main road, or similar circumstances.

CASE STATED by justices for the city of Carlisle.

An information was preferred by the appellant against the respondent charging that he, on 30th September 1968, in the city of Carlisle, drove a motor vehicle having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from a laboratory test exceeded the prescribed limit at the time he provided the specimen, contrary to s. 1 (1) Road Safety Act 1967.

The justices determined that a breath test which was administered to the respondent was not administered “there or nearby” as required by s. 2 (1) of the Road Safety Traffic Act, 1967, and they, therefore, concluded that evidence of tests and analysis subsequent to that was not admissible and dismissed the information. The prosecutor appealed.

G. K. Naylor for the appellant.

Gordon Slynn as amicus curiae.

The respondent did not appear.

LORD PARKER, C.J.: This is an appeal by way of Case Stated from a decision of justices for the city of Carlisle who dismissed an information preferred by the appellant against the respondent for an offence contrary to s. 1 (1) of the Road Safety Act 1967.

The short facts were that the respondent was driving his motor car in Grapes Lane, Carlisle, at 12.15 a.m. on 30th September last. He was there seen by a police officer who suspected him of having taken drink. He was asked to give, and gave, a breath test which proved positive. He was arrested and taken to the police station; a second breath test was taken which proved positive; and thereupon he gave a sample of blood which on analysis showed that there were 124 milligrammes of alcohol per 100 millilitres of blood as against the prescribed limit of 80 milligrammes. Pausing there, one would say that this was a clear case for a conviction. But I have omitted the facts which are really material in this case. When the officer stopped the respondent in the first instance, he told him that he wanted him to take a breath test, but he had not got the necessary equipment with him, and he there and then radioed to the police headquarters for such equipment. Thereupon, and I think very sensibly, the officer asked him, instead of waiting for the equipment to arrive, to walk with him in the direction from which the equipment would be brought, and they in fact walked 160 yards in that direction where a police car carrying the

equipment met them and the breath test was taken. Section 2 (1) of the Act of 1967 provides that:

"A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause—(a) to suspect him of having alcohol in his body . . ."

The justices, although apparently with reluctance as they said, came to the conclusion that the place where the breath test was in fact provided, namely 160 yards from the place where the respondent was stopped, was not "there or nearby". It is from that decision that the prosecutor appeals, and reference is made to cases in the past in which the test has been taken some distance away from the place where the driver was stopped. In *Arnold v. Chief Constable of Kingston-upon-Hull* (1), a decision given on 29th April of this year, this court held that the question whether or not a particular place where the requirement to take a breath test is made is "there or nearby" is a matter of degree and of fact for the justices.

In my judgment, that is quite clear, and the only matter which has concerned me is: By what criteria is one to judge "nearby"? It is, of course, used in a purely geographical sense, but it may be that it is to be judged also in the light of the time interval that elapsed between, in this case, the driver being stopped, and the breath test being made. It seems to me, however, that one must judge "nearby" in the purely geographical sense, and I can only think that the words "or nearby" were inserted in order to cover the case where it was necessary to take the test, not on a main road, but in a lay-by or in some such circumstances as that. At any rate, these justices have gone into the matter with care. They have come to the conclusion that 160 yards is not nearby, and I do not see how this court can interfere. I confess that as I said earlier I think the constable in the present case was doing a very reasonable thing, and I find it unnecessary to consider what would have happened if he had asked the respondent to stay where he was, waiting for the equipment to come. It is sufficient here to say that this is a finding of fact with which this court cannot interfere.

MELFORD STEVENSON, J.: I agree.

COOKE, J.: I agree.

Appeal dismissed.

Solicitors: *Wainwright & Co., for Yelloly & Burnett, Carlisle; Treasury Solicitor.*

T.R.F.B.

(1) QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND WILLIS, JJ.)

April 29, 1969

ARNOLD v. CHIEF CONSTABLE OF KINGSTON-UPON-HULL

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Provision of specimen—Breath test—Provision of specimen of breath "there or nearby"—Matter of degree and fact—Road Safety Act, 1967, s. 2 (1).

Whether or not the place where the requirement to take a breath test under s. 2 (1) of the Road Safety Act, 1967, is "there or nearby" [to the place where the driving or attempting to drive has taken place] and whether the requirement was made as soon as reasonably practicable after the commission of the traffic offence are matters of degree and of fact for the justices who try the case.

CASE STATED by the recorder of Hull.

The appellant was convicted by magistrates of driving or being in charge of a motor vehicle with blood-alcohol concentration above the prescribed limit, contrary to s. 1 of the Road Safety Act, 1967. He appealed to quarter sessions, and the recorder of Hull allowed the appeal.

D. A. Jeffreys for the respondent.

R. H. Hutchinson for the appellant.

LORD PARKER, C.J.: The short facts found by the recorder were that on 25th May 1968, a Mr. Cannon heard a noise outside his house as if somebody was interfering with his motor cycle combination which he had parked outside the house. The time was then about 10.50 p.m., and on looking out of the window he saw the appellant and another man holding the handlebars of the combination and pushing it along the road. He ran out of his house and detained the appellant. The other man ran away. Shortly after at 10.53 p.m. a police constable arrived on the scene, and, after a short struggle, arrested the appellant. He charged him with the offence of attempting to take and drive away a combination without the consent of the owner.

The appellant was then placed in the rear seat of a police car where he remained until about 11.20 p.m., and was then taken a distance of some $1\frac{1}{2}$ miles to the police station. It was during that journey, or on arrival at the police station, that the police constable came to the conclusion that the appellant had been drinking, and accordingly on arrival at the police station he said to the appellant: "You have committed a moving traffic offence, and I require you to take a breath test". The appellant agreed and thereafter the ordinary procedure was followed. On analysis the urine sample was found to contain 156 milligrammes of alcohol in 100 millilitres of urine.

The grounds on which the recorder allowed this appeal were really threefold. He came to the conclusion, first, that the requirement to take a breath test was not made "there or nearby" within the meaning of s. 2 (1); secondly, that it had not been required as soon as reasonably practicable within the proviso (1) to s. 2 (1); and, finally, that he had not been arrested under s. 2 of the Act, or s. 6 (4) of the Road Traffic Act 1960, and that accordingly there was no power to require a specimen of blood or urine to be taken.

So far as I am concerned it seems to me that whether or not this place where the requirement to take the breath test is made is, to quote the words of the Act, "there or nearby", and whether the requirement was made as soon as reasonably practicable after the commission of the traffic offence, are matters of degree and of fact for the justices, and in this case for quarter sessions. For my part I cannot see how this court could interfere and say that the recorder could not find, for instance, that $1\frac{1}{2}$ miles was other than there or nearby, or that the interval of time between the arrival of the police officer and the time when the breath test was required at the police station was as soon as reasonably practicable. Accordingly, I find it unnecessary to consider the third ground. I would dismiss this appeal.

MELFORD STEVENSON, J.: I agree.

WILLIS, J.: I agree.

Appeal dismissed.

Solicitors: *T. D. Jones & Co.*, for David Morgan, Kingston-upon-Hull; *Payne & Payne*, Kingston-upon-Hull.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON AND MEGAW, L.JJ., AND O'CONNOR, J.)

July 11, 1969

R. v. DOLAN

Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Charge of failure to provide specimen for laboratory test—Evidence whether defendant received mandatory warning contradictory—Issue to be left to jury—Direction to jury—Road Safety Act 1967 (c. 30), s. 3 (3), (10).

On a prosecution for failing to provide a specimen of blood or urine for a laboratory test without reasonable excuse, contrary to s. 3 (3) of the Road Traffic Act, 1967, where the defendant disputes the evidence of the prosecution that he received the warning under s. 3 (10) regarding the consequences of failing to comply with a request for a specimen, this issue should be left to the jury since they might regard it as highly relevant on the question whether the defendant had a reasonable excuse for refusing to supply a specimen, and the jury should be directed that, if they are not satisfied beyond a reasonable doubt that the defendant was so warned, they ought to take that into account when considering the issue of reasonable excuse.

APPLICATION by Martin Dolan for leave to appeal against his conviction at Inner London Quarter Sessions of failing to provide a specimen of blood or urine for a laboratory test without reasonable excuse contrary to s. 3 (3) (a) of the Road Safety Act 1967 when he was fined £15 and disqualified from holding a driving licence for 12 months.

R. J. Barby for the applicant.

Ann Curnow for the Crown.

SALMON, L.J., delivered the judgment of the court: The only ground of the appeal which is now relied on is the complete inadequacy of the summing-up. Section 3 of the Road Safety Act 1967, in so far as it is material, is in these terms:

"(3) A person who, without reasonable excuse, fails to provide a specimen for a laboratory test in pursuance of a requirement imposed under this section shall be guilty of an offence . . .

"(6) A person shall not be treated for the purposes of . . . subsection (3) of this section as failing to provide a specimen unless—(a) he is first requested to provide a specimen of blood, but refuses to do so; (b) he is then requested to provide two specimens of urine within one hour of the request, but fails to provide them within the hour or refuses at any time within the hour to provide them; and (c) he is again requested to provide a specimen of blood but refuses to do so . . .

"(10) A constable shall on requiring any person under this section to provide a specimen for a laboratory test warn him that failure to provide a specimen of blood or urine may make him liable to imprisonment, a fine and disqualification, and, if the constable fails to do so, the court before which that person is charged with an offence under s. 1 of this Act or this section may direct an acquittal or dismiss the charge, as the case may require."

The police gave evidence that they had complied with the provisions of sub-s. (6) and sub-s. (10). When the applicant gave evidence he questioned whether the procedure laid down in sub-s. (6) had been complied with and specifically stated that he had not been given the warning required by sub-s. (10).



In a case where there is a charge under s. 1 of the Act of 1967 this court has held in *R. v. Brush* (1) that the powers of the court conferred by sub-s. (10) are to be exercised by the judge and that he need not, in such a case, leave anything under that subsection to the jury. The position, however, is quite different when, as here, the prosecution is under s. 3 (3) of the Act, for failing to supply a specimen for a laboratory test without reasonable excuse. The defect in the summing-up in this case consists of this: the learned chairman did not, as he should have done, tell the jury that an accused cannot be found guilty of this offence if he had any reasonable excuse for failing to provide a specimen. In prosecutions under s. 3 (3) where the accused has challenged the prosecution evidence that he was warned of the consequences of failing to comply with a request for a specimen, this issue should be left to the jury since they might regard it as highly relevant on the question whether the accused had a reasonable excuse for refusing to supply a specimen. Unless he is given the warning which sub-s. (10) makes mandatory, he may not know the law and may have no idea that he has a statutory obligation to comply with the request and is committing a criminal offence if he refuses to do so. Ordinary fairness demands that once the accused has denied that he has been given the warning, the jury should be reminded of his evidence; they should be asked to decide whether the police have satisfied them beyond a reasonable doubt that he had been warned; they should be told that if they are not so satisfied, then they ought to take that into account in considering whether or not the accused had a reasonable excuse for not complying with the request, and that if they are left in doubt on the question as to whether he had a reasonable excuse then he should be acquitted. If any jury came to the conclusion that the accused had not been given the mandatory warning and was ignorant of his legal obligations, it is difficult to see how they could properly convict under s. 3 (3). And they should be so directed. The learned chairman did not say a word to the jury about the applicant's clear evidence that he had received no warning as to the consequences of refusing to supply a specimen. In these circumstances this court fully agrees with counsel for the Crown when she very fairly says that this conviction cannot be supported; it clearly is unsupportable. The appeal is allowed. The applicant is entitled to his costs.

Conviction quashed.

Solicitors: *Coles & Stevenson; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(EDMUND DAVIES, L.J., NIELD AND JAMES, JJ.)

May 6, 8, 1969

R. v. FREDERICK

Dangerous Drugs—Unauthorised possession—Evidence—307 grains of cannabis resin found in passage leading to appellant's flat—Traces in pipes and pouch found in flat—No investigations of scientific evidence relating to traces.

In a passage leading to the appellant's flat a television set was found inside which was a bag bearing the appellant's name and containing a package containing 307 grains of cannabis resin. In the flat were found pipes and a tobacco pouch with traces of cannabis and cannabis resin, but there was no scientific evidence as to the amount of the drugs. On a charge against the appellant of being in unauthorised possession of approximately 307 grains of cannabis resin, the prosecution contended that the appellant was in possession of (i) the cannabis resin found in the television set; (ii) the traces found in the pipes and pouch; and (iii) other cannabis resin, as a result of inferences properly to be drawn from (i) and (ii). The jury returned a verdict of guilty.

HELD: the charge in the indictment was framed in words wide enough to cover the case presented by the prosecution, and the proper inference was that the jury had found that the charge of possessing approximately 307 grains of cannabis resin was proved.

APPEAL by Fitzroy Frederick against his conviction at Inner London Quarter Sessions of possessing cannabis resin.

B. Sinclair for the appellant.

R. D. L. Du Cann for the Crown.

Cur. adv. vult.

8th May. EDMUND DAVIES, L.J., read this judgment of the court: On 21st November 1968 at the Inner London Quarter Sessions the appellant Fitzroy Frederick was convicted on a charge—

“that on 12th July, 1968, he had in his possession without being duly authorised approximately 307 grains of cannabis resin.”

He was sentenced to a term of nine months' imprisonment. With the leave of the single judge he now appeals against that conviction.

The facts are that on 12th July 1968 police officers went to 19A, Cremorne Road, London, S.W.10, where the appellant occupied a basement flat. In a cupboard in the basement passage they found an old television set, and inside it a polythene laundry bag which bore the appellant's name. Inside the bag was a package containing 307 grains of cannabis resin. In the appellant's flat itself, according to the evidence of the police officers, there were on the mantelpiece a small clay pipe and on a table a wooden pipe and a tobacco pouch. The police took possession of all these articles, and they were subjected to scientific analysis by Mr. Cook, whose evidence was read to the jury, he having been conditionally bound over, and it was wholly unchallenged. Mr. Cook identified the contents of the package as 307 grains of cannabis resin. Of the pipes and pouch he said:

“I found traces of cannabis in the bulbs and stems of both these pipes . . . I found traces of cannabis resin among the tobacco within this pouch.”

Although no evidence was adduced as to the meaning of “a trace of cannabis”, the deputy chairman told the jury in his summing-up: “... a trace means a quantity so small that it cannot be measured scientifically in any way, at all.”

This court is at a loss to understand why such a definition was proffered; certainly the unchallenged scientific evidence affords no basis for it. There have been many cases, of which *R. v. Graham* (1) (shortly to be mentioned) is one, where the word "traces" has been used in relation to quantities which, while small, have nevertheless been capable of being both weighed and measured. To the police officers the appellant denied having cannabis in his flat, and when shown the package said: "It's not mine, man. I used to smoke it, but not any more. I've had the cure, man." He suggested that some other person might have put the cannabis in the place where it was found. At the trial the appellant denied all knowledge of the cannabis found in the television set. There was evidence that other occupants of the premises used the basement passage and left suitcases and unwanted possessions there; but evidence given by witnesses for the defence under cross-examination tended to establish that the appellant was in truth the owner of the television set. He said that the small clay pipe had been given to him as a present and he did not use it. There was a dispute as to the place where the officer found the wooden pipe, the appellant saying it was not near his pouch and had been left in the flat by its last tenant and that he had never used it. He admitted that the pouch was his, but denied that it contained any cannabis resin.

This court is informed by counsel for the Crown that the Crown case from first to last was that the evidence established: (a) that the appellant was in possession of the cannabis resin found in the television set; (b) that the appellant was in possession of the traces of cannabis resin found in the pipes and pouch; and (c) that the appellant had been in possession of other cannabis, this being proved by inference from the presence of cannabis resin and traces of cannabis resin found. This court is further informed that a submission on the appellant's behalf was made at the end of the case of the prosecution that there was no or no sufficient evidence that he was in possession of the cannabis resin found in the television set. That submission failed. But at no time was it submitted that it could not be said that cannabis or cannabis resin was present in the pipes or pouch on the basis that proof of a "trace" is not proof of sufficient quantity to constitute possession of the drug itself. This issue has, however, been raised in this court, and it is not free from difficulty. In the course of the summing-up the jury was directed in these terms:

"Should you come to the conclusion that you are not satisfied that the [appellant] was in possession of the 307 grains of cannabis, but you think he was in possession of those traces—that is to say, in his pipes and in his pouch—you will find him guilty just the same, because, members of the jury, the law is absolute. You must not have any dangerous drug in your possession, and no matter how small the quantity may be, a trace means a quantity so small that it cannot be measured scientifically in any way, at all. If, on the other hand, you came to the conclusion that you were satisfied the [appellant] did possess the 307 grains in the cupboard, and not the traces, you find him guilty just the same. Of course, it follows if you find he is in possession of all of it, the 307 grains and the traces, well then obviously your verdicts will be one of guilty."

When the learned deputy chairman was concluding his summing-up he said:

"You only return one verdict of guilty, and you return a verdict of guilty if you are satisfied beyond reasonable doubt that the [appellant] was in possession of approximately 307 grains of cannabis resin, or any quantity

(1) Ante p. 505; [1969] 2 All E.R. 1181.

or substance less than that, no matter how small the quantity may happen to be."

As the jury returned a general verdict of guilty, it is urged that there is no means of knowing whether they found the appellant guilty on the basis of all three contentions of the Crown or only one or more of them and, if so, on which. Counsel for the appellant seeks to rely on *R. v. Worsell* (1), and has submitted that as but traces of cannabis and cannabis resin were found in pouch and pipes, possession of such quantity could not per se constitute the offence charged. Furthermore, he relies on the passages in the summing-up already referred to in which the deputy chairman dealt disjunctively with the 307 grains of cannabis resin and the traces and directed the jury that possession of either would justify a verdict of guilty. But *R. v. Worsell* (1) turned on very special facts, the amended charge being that the accused was in possession of "a few droplets of diamorphine". A tube found in the accused's possession, when examined microscopically, was found to contain approximately one-hundredth of one-sixth grain of a heroin tablet in the form of a very few small droplets which could not be measured and could not be poured out. They were described as amounting to no more than "a wetness inside the tube". SALMON, L.J., giving the judgment of the court, said:

"The sole question is, was there any evidence on which a jury could come to the conclusion that the tube found under the dashboard contained a drug at the moment when the police discovered it? . . . This court has come to the clear conclusion that inasmuch as this tube was in reality empty . . . it is impossible to hold that there was any evidence that this tube contained a drug. Whatever it contained, obviously it could not be used and could not be sold. There was nothing in reality in the tube."

R. v. Worsell needs to be contrasted with *R. v. Graham* (2), which was tried before *R. v. Worsell* reached the Court of Appeal. Graham was convicted of being in possession of cannabis resin on 7th August 1968. The evidence was that the police took some scrapings from his pockets, and these were found to contain traces of cannabis which, while very small, were capable of being weighed and measured. Dismissing his appeal to this court on 24th January 1969, FENTON ATKINSON, L.J., said:

"This case being tried before *R. v. Worsell* (1), no point was made by the defence that the quantities found were so minimal as in truth to amount to nothing. The case was really being run on the basis that these were very small amounts of cannabis and that being so it could well be that he did not know it was there and he was not truly in possession . . . On the evidence of the scientific officer that what was found in each of the three pockets could in fact be measured and weighed in milligrammes, we do not think that as a matter of law it could be said that there was in truth no cannabis in the appellant's possession."

In the present case also there was no investigation of the scientific evidence with a view to establishing that what were described as "traces" of cannabis and cannabis resin found in the pouch and both pipes in reality amounted to nothing. However, the manner in which the prosecution put their case resulted in the complication being introduced into the summing-up that the jury could find the appellant guilty if they were satisfied that he was in possession of the 307 grains or in possession of the traces. This was unfortunate and, indeed, in the view

(1) Ante p. 503; [1969] 2 All E.R. 1183.

(2) Ante p. 505; [1969] 2 All E.R. 1181.

of this court quite unnecessary, for the Crown had an extremely strong case in regard to the 307 grains and could rely on the presence of the traces in the pipes and the pouch to support that case. They had no need to seek to establish, as an entirely separate ground on which a conviction could be based, the actual presence of the drug in the pipes and pouch at the time when the police took possession of those articles. However that may be, the charge in the indictment was framed in words wide enough to cover the case which the Crown sought to establish, and in the way the case was run the summing-up did not contain any misdirection.

As to the submission by counsel for the appellant that there is no means of knowing exactly what the jury decided, it is to be noted that when the jury returned with their verdict after a retirement of ten minutes, the clerk of the court asked the foreman: "On this indictment, do you find [the appellant] guilty or not guilty?" This indictment charged the appellant with the possession, as we have already said, of approximately 307 grains. The deputy chairman clearly drew the inference that the jury had found this to be proved. Having regard to all the circumstances, this court is of the view that that inference could properly be drawn. We would only add that had the court entertained any doubt on the issue whether the traces in this case were insufficient to constitute the necessary presence of a drug, we would without hesitation have applied the proviso. For these reasons the court dismisses this appeal.

Appeal dismissed.

Solicitors: *Michael Cohen & Co.; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SACHS AND KARMINSKI, L.JJ., AND LAWTON, J.)

July 3, 1969

R. v. FORD

Criminal Law—Sentence—Offence of dishonesty—Curative element—Alcoholic—Sentence not to exceed that appropriate to offence.

In relation to offences of dishonesty sentences of imprisonment, except where there is an element of protection of the public involved, are normally intended to be the correct sentence for the particular crime and not to include a curative element.

The appellant, who was a chronic alcoholic and had failed in the past to respond to treatment, was sentenced to 27 months' imprisonment for an offence of dishonesty. In imposing the sentence the judge had in mind the possibility of the appellant being cured, to some extent at any rate, of his alcoholism while in prison, and in particular, of his going to a prison alcoholic unit for treatment.

HELD: the sentence must be reduced to one which was appropriate to the offence, namely, 12 months' imprisonment.

APPEAL against sentence by Edward Ford who had pleaded guilty at Birmingham Quarter Sessions to housebreaking and larceny and was sentenced by the recorder to 27 months' imprisonment.

B. A. Farrer for the appellant.

The Crown did not appear.

SACHS, L.J., delivered the judgment of the court: On 8th January 1969 at Birmingham Quarter Sessions the appellant pleaded guilty to housebreaking and larceny. He made no request for any offences to be taken into consideration. He had a record to which reference will be made later, and he was sentenced to 27 months' imprisonment. His co-accused (one Sherman) pleaded guilty to the same count and also to another, and asked for nine other offences to be taken into consideration. He was a man with a record of 15 previous appearances before the courts, quite apart from the minor ones. He was sentenced to 12 months' and nine months' imprisonment concurrent, making a total of 12 months, which was 15 months shorter than the sentence imposed on the appellant.

The offence to which the appellant and Sherman pleaded guilty was the ransacking of the house of a Mr. Waite, where they stole a watch, a radio, a cigarette lighter, an electric razor and other articles to a total value of £100, of which £60 worth was recovered. The only previous convictions of the appellant for offences of dishonesty were in May 1964, when the offence was shopbreaking and a hospital order under s. 60 of the Mental Health Act 1959 was made, and then in October 1964 for the larceny of a bicycle when he was given an absolute discharge so as to return to Warwick Hospital. Apart from dishonesty, he had a large number of convictions for offences of being drunk and of causing damage while in drink: he appears to have been a chronic alcoholic. The learned recorder in imposing the sentence of 27 months' imprisonment had in mind the possibility of the appellant being cured, to some extent at any rate, of his alcoholism whilst in prison and, in particular, of his going for a period to the Wakefield prison alcoholic unit where he might obtain treatment. When one looks at the subsequent reports which are now before this court it is clear that the appellant is someone who has no real interest in getting cured. He declined at one stage to join Alcoholics Anonymous, he is a man who is very difficult to deal with, and in the end when he was offered a vacancy at the Wakefield prison alcoholic unit he declined to go there—as one of the many reports before this court indicates. He is not interested in treatment and has failed to co-operate on five or six previous occasions. In those circumstances the intention of the learned recorder that he should receive a cure during his imprisonment obviously cannot be implemented, and this court has simply to deal with the matter on the basis of what is the appropriate sentence. The appropriate sentence, in the view of this court, is 12 months' imprisonment.

This court only desires to add one further thing. In relation to offences of dishonesty sentences of imprisonment—except when there is an element of protection of the public involved—are normally intended to be the correct sentence for the particular crime, and not to include a curative element. This court wishes to make it clear that what it is now saying has nothing to do with special cases such as those of possessing dangerous drugs or cases where the protection of the public is involved; but it seems to this court that in the case now under consideration the learned recorder (with the best of intentions) adopted a wrong principle when approaching the question of sentence. The appeal succeeds to the extent indicated.

Sentence varied.

Solicitor: Registrar of Criminal Appeals.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON AND MEGAW, L.JJ., AND O'CONNOR, J.)

July 8, 1969

R. v. MOON

Criminal Law—Defence—Self-defence—Direction to jury.

Where an issue of self-defence has been raised, the jury should be directed that the defendant is entitled to be acquitted unless the prosecution has satisfied them beyond reasonable doubt, or so that they are sure, that self-defence cannot be supported, and the precise nature of self-defence should be explained to the jury.

Criminal Law—Trial—Summing-up—Mistake as to burden of proof—Correction.

If a mistake with regard to burden of proof has been made in a summing-up, it must be corrected in the clearest possible terms.

APPEAL by Christopher Robert John Moon against his conviction at Plymouth City Quarter Sessions of an assault occasioning actual bodily harm. In his summing-up the assistant recorder told the jury that before they could acquit on the ground of self-defence the appellant had to satisfy them on the balance of probabilities that he had acted in self-defence. The attention of the assistant recorder was drawn to this slip at the end of the summing-up and he then made some further observations to the jury on that subject.

A. D. Rawley for the appellant.

I. B. Purvis for the Crown.

SALMON, L.J., in delivering the judgment of the court: Counsel for the appellant has said that when, throughout the whole of a summing-up, the judge by a slip misdirects the jury on the onus of proof, this is a fault which is incapable of being put right. This court would not go as far as that; it can be put right, although it may be difficult to do so. This court would accept the second half of counsel's proposition—that, on the assumption that the mistake can be put right, as this court thinks that it can, it can only be put right in the plainest possible terms. It would be necessary, as counsel says, for the learned judge who has given the direction to repeat the direction which he has given, to acknowledge that that direction was wrong, to tell the jury to put out of their minds all that they had heard from him about the burden of proof up to that moment, and then in clear terms which would be incapable of being misunderstood by a jury tell them plainly and simply what the law is. It is really quite simple. There is no burden of any kind on the accused to make out self-defence. Once that defence has been raised, the accused is entitled to be acquitted unless the prosecution satisfy the jury beyond a reasonable doubt, or so that they are sure, if that form is preferred, that self-defence cannot be supported. It would also be necessary to explain to the jury the precise nature of self-defence.

Unfortunately there was this slip in this case. Unfortunately the passage at the end of the transcript when there was an attempt to put this matter right does not, in the opinion of this court, effectively do so. There is a very real risk, indeed a probability, that the jury must have approached the case on the basis that it was for the appellant to establish self-defence before they could acquit him. Counsel for the Crown very rightly says that it would be impossible to apply the proviso to s. 2 (1) of the Criminal Appeal Act 1968 here. In the circumstances there is no alternative other than to allow the appeal. This of course means that the suspended sentence remains in suspension, and the sentence imposed is quashed.

Appeal allowed.

Solicitors: Registrar of Criminal Appeals; J. A. Pearce & Major, Plymouth.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(SALMON AND MEGAW, L.JJ., AND O'CONNOR, J.)

June 30, July 15, 1969

R. v. LUDLOW

Criminal Law—Indictment—Joinder of counts—Offences of similar character—Robbery and attempted larceny—Offences committed in neighbouring places within short period of time—Indictments Act, 1915, Sch. 1, r. 3.

By r. 3 of Sch. 1 to the Indictments Act, 1915, "Charges for any offences . . . may be joined in the same indictment if those charges . . . form or are a part of a series of offences of the same or a similar character.

The word "similar" in this rule should not be given a restricted meaning. Accordingly, offences of robbery and attempted larceny committed in neighbouring public houses within a short period of time,

HELD: to be properly joined in one indictment, and it was within the discretion of the trial judge to order them to be tried together.

APPEAL by Edward Alexander Ludlow against his convictions at the Central Criminal Court on two counts, one charging attempted larceny, and the other robbery with violence, when he was sentenced to consecutive terms of six months' and 18 months' imprisonment.

R. Grey for the appellant.

M. H. Hill for the Crown.

Cur. adv. vult.

15th July. SALMON, L.J., read the judgment of the court: As to the count of attempted larceny: on the evening of 20th August 1968 at the Windmill public house in Acton the appellant was seen by a barman emerging from a window of the staff room which had been left open. The barman asked him what he was doing. He did not reply but his companion, who was standing outside the window, said: "You're wasting your time, there's nothing in there worth pinching." The barman went into the staff room and found all the drawers left open and other indications of a search having been made. Earlier in the evening he had visited the room and found nothing disturbed. The barman called the police, but when they arrived the appellant had disappeared. On 5th September the barman identified him to the police. When he was questioned by the police, he said "He can say what he likes. My mates will fix him". He admitted that he had been to the private part of the public house on 20th August, but denied that he had done anything there. When the appellant gave evidence, he denied that the barman had seen him emerging from the window, and suggested that it was his companion, and not he, who had been inside the private part of the public house, and that he had remained outside. He tried to explain his admission to the police that he had been inside the private part of the public house by saying that he had been referring to the garden. On the evening of 20th August, however, the garden had been open to the public and was being used as a beer garden. The appellant's story was obviously very thin. There was strong evidence which clearly the jury accepted that the appellant had attempted to steal.

As to the count of robbery: on 5th September 1968 the appellant and two others were drinking in the Prince of Wales public house in Acton where they remained for about two hours. Prior to 2.55 p.m., the appellant had ordered a number of rounds of drinks for the three of them and paid on each occasion. Finally, at about 2.55 p.m., he ordered and was supplied with three more rums.

When the relief manager, Mr. Fuller, asked the appellant to pay for these drinks the appellant refused saying "You'll have to chase me if you want paying for these". He then walked out of the public bar. Mr. Fuller followed him and threatened to call the police unless the appellant paid him for the three rums. The appellant then produced a 10s. note and as he handed it to Mr. Fuller said "I will only pay for my bloody drink". Mr. Fuller went over to the till and rang up 9s. 9d., the price of the three drinks owed to him by the appellant. The appellant then got behind the counter and said "I will break a bloody bottle if you charge me". Mr. Fuller told him to get back to the public side of the counter, whereupon the appellant snatched the 10s. from Mr. Fuller's hand and punched him in the face, breaking his glasses and cutting his face below the left eye and knocking a tooth out in doing so. He then ran away. The appellant stated in the witness box that he had only ordered one drink, that he should only have been asked to pay 3s. 3d. for that drink, and that when he saw 9s. 9d. registered on the till he considered himself entitled to recover the 10s. note. He admitted he was wrong in using violence.

The first point that arises for consideration is whether a count for attempted larceny can properly be joined with a count for robbery. This depends on the true construction of the Indictments Act 1915, Sch. 1, r. 3, which in so far as it is material, reads as follows:

"Charges for any offences . . . may be joined in the same indictment if those charges . . . form or are a part of a series of offences of the same or a similar character."

The question is, were these a series of offences of a similar character? In the view of this court, these two offences committed within a comparatively short time of each other in neighbouring public houses could properly be described as a series of offences. Equally clearly, they were of a similar character. Robbery consists, amongst other things, of stealing by violence. Robbery and simple larceny have always been considered to be offences of a sufficiently similar character to enable a man charged with robbery alone, to be acquitted of robbery but convicted of simple larceny. An attempted larceny is obviously a similar offence to larceny, and, in our view, also to robbery. There was, therefore, nothing technically wrong with the indictment. Strangely enough, there does not appear to be any direct authority on this point. There can, however, be no valid reason for giving a restricted meaning to the word "similar" in r. 3 of Sch. 1 to the Indictments Act 1915, particularly as the judge has a complete discretion to order the counts to be tried separately. Accordingly, the point that the two counts were improperly joined in the same indictment fails.

The next point taken was that the learned commissioner wrongfully exercised his discretion in refusing to order the two counts to be tried separately. It is, however, well settled that this court will not interfere with such an exercise of discretion unless it can be seen that justice has not been done or unless "compelled to do so by some overwhelming fact": *R. v. Hall* (1) per LORD GODDARD, C.J.; *R. v. Flock* (2). It may be that different judges might have exercised their discretion differently on the facts of the present case. This court, however, is quite satisfied that there has been no possibility of any miscarriage of justice, and that there is no other factor which would justify us in interfering with the learned commissioner's exercise of his discretion. The evidence against the appellant on each count was overwhelming. Accordingly, the contention that

(1) 116 J.P. 43; [1952] 1 All E.R. 62; [1952] 1 K.B. 302.

(2) [1969] 2 All E.R. 784.

this court should quash the convictions or either of them on the grounds that the judge wrongly exercised his discretion fails.

Finally, it was contended on behalf of the appellant: (i) that he could not be guilty of robbery because he had never transferred his property in the 10s. note, and no one can be guilty of stealing his own property; and (ii) that the learned commissioner had given no adequate direction on this point. There may be very special circumstances in which a man may be convicted of stealing his own property, *Rose v. Matt* (1), but it is not suggested that any such circumstances exist in the present case.

There can be no doubt but that the appellant parted with the possession of the 10s. note to Mr. Fuller. The learned commissioner evidently considered that in the circumstances of this case it was unnecessary and possibly undesirable to submit the jury to an exposition of the complicated rules of law relating to the passing of property in goods or money. This court agrees with him. The learned commissioner gave the jury the following direction:

"You will see from what I have told you that it is not necessary to prove whose real property that ten shilling note was at that moment, because if it was the property of Mr. Fuller at that moment, and [the appellant] honestly believed that it was his property, it would still not be robbery for him to recover it, if he could, if he honestly believed it was his property. So you need not worry whose property it really was. What you have got to concentrate on is: did he honestly believe it was his property?"

This means, and must have been understood by the jury to mean, that even if the 10s. note was not the appellant's property, he could not be guilty of robbery if he honestly believed that it was. No complaint can properly be made of that direction. It had not been suggested by the Crown that if the note remained the appellant's property he could have been guilty of stealing it.

No complaint was or could properly have been made about the learned commissioner's direction on the burden of proof. The jury, by their verdict of "Guilty" must, therefore, have been satisfied beyond any reasonable doubt that when the appellant snatched the 10s. note he had no honest belief that it belonged to him or that he had any right to retake possession of it. No one could have known better than he did whether he had parted with his property in the note. If he had no honest belief that he had any right to retake the note it necessarily follows that when he parted with the note he must have intended the property to pass and, therefore, it did pass. Accordingly, in the circumstances of this case, the fact that he did not honestly believe that the note was his or that he had any right to take it would make any argument to the effect that nevertheless it may have remained his property wholly unrealistic, nor was any such argument advanced. It was thus necessarily implicit in the jury's verdict that the note did not belong to the appellant when he dishonestly snatched it from Mr. Fuller.

Counsel for the appellant relied on a passage in the judgment of COLERIDGE, L.J., in *R. v. Buckmaster* (2), in which he cited with approval a ruling by WOOD, B., given in *R. v. Oliver* (3) and cited by counsel in *R. v. Walsh* (4)—a case in which no judgment was ever pronounced. In these cases the complainant had been cheated by the accused into parting with possession of goods or money and the question being considered was whether the evidence

(1) 115 J.P. 122; [1951] 1 All E.R. 361; [1951] 1 K.B. 810.

(2) (1887), 52 J.P. 358; [1886-90] All E.R. Rep. 400; 20 Q.B.D. 182.

(3) Cited 2 Leach 1072, 4 Taunt. 274.

(4) (1812), Russ. & Ry. 215; 4 Taunt. 258; 128 E.R. 328.

could support a conviction for larceny by a trick at common law. These cases are no doubt of considerable historical interest but have little relevance to the facts of the present case. There are no grounds for any criticism of the learned commissioner's summing-up on the robbery count, and the evidence against the appellant was overwhelming.

The appeal is, accordingly, dismissed.

Appeal dismissed.

Solicitors: *Somers & Laity; Solicitor, Metropolitan Police.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WALLER AND O'CONNOR, JJ.)

July 24, 1969

R. v. LINNELL

Criminal Law—Indictment—Duplicity—Inducement to enter into agreement to invest money—Count charging two statements and two promises as inducement—Allegations of method by which inducement accomplished—Prevention of Fraud (Investments) Act 1958, s. 13 (1) (a).

The appellant was charged on a count of an indictment which alleged that, contrary to s. 13 (1) (a) of the Prevention of Fraud (Investments) Act 1958, he fraudulently induced G. to enter into an agreement to invest money in his (appellant's) company "by promising orally [that the money would be used to acquire a share in the company], by stating [that the company had a successful and profitable business], by promising [that the investment would lead to G. being given a secure position with the company], and by stating [that the appellant was in a position to give and had given G. honest advice], all of which statements and promises [the appellant] knew to be misleading, false and deceptive at the time of making the same."

HELD: the count was not bad for duplicity or uncertainty because the offence was that of fraudulently inducing another person to enter into an agreement to invest money, and the allegations of the statements and promises were merely allegations of the means by which the inducement was accomplished.

APPEAL by Anthony Arthur Thomas Linnell against his conviction at Somerset Assizes before the commissioner, SIR JOSEPH MOLONY, Q.C., of five offences of fraudulently inducing the investment of money contrary to s. 13 (1) (a) of the Prevention of Fraud (Investments) Act 1958 when he was sentenced to twelve months' imprisonment.

Count 5 of the indictment read as follows:

"The fifth count charges you with fraudulently inducing investment of money in that you on divers days between the 1st day of January 1962 and the 31st day of May 1962 in the county of Somerset fraudulently induced Richard James Girvin to enter into an agreement with you to invest £1,500 in Anthony Linnell & Co. (Somerset) Ltd. with a view to acquiring shares in the said company by promising orally and by letter dated 1st March 1962 that the said money would be used for acquiring a 15% share in Anthony Linnell & Co. (Somerset) Ltd. which would comprise two established offices at Clevedon and Bristol then carrying on business as estate and insurance agents, and by stating (a) that the said practice was then a successful and profitable practice associated with other companies which were also at that time profitable and successful; (b) that the said

investment was required for further expansion of the business of those practices, and by promising that the said investment would lead to his being given a secure position with the company, and by stating that you were in a position to give and did give honest advice as to the investment of the said money, all of which statements and promises you knew to be misleading, false and deceptive at the time of making the same."

J. W. Black for the appellant.

G. G. Macdonald for the Crown.

WALLER, J., delivered this judgment of the court. The appellant was convicted at Wells Assizes on 21st November 1968 after a trial lasting 19 working days on five counts of fraudulently inducing investment of money, contrary to s. 13 (1) (a) of the Prevention of Fraud (Investments) Act 1958. He applied only for legal aid, but it was clear when the case came before this court on 6th June 1969 that he was applying for leave to appeal submitting a number of grounds of appeal. On that occasion all those grounds which this court viewed as involving questions of fact were dealt with, and the application for leave to appeal was refused; but as there were two grounds which appeared to the court to be questions of law, the appellant was granted legal aid for those grounds to be argued.

Although the trial took 19 working days, having regard to that limitation of the points which are put before the court today, it is not necessary to set out the facts at any length. The appellant had a business in Somerset, and there came a time when he decided to expand that business into a number of estate agency businesses. He was minded to open a number of branches at other places; he advertised in the Press and, as a result, a series of people were approached with a view to making investments in the business. It was in respect of five of those persons that the convictions for the five offences took place which I have just mentioned. There were originally 20 counts in the indictment, but ultimately there were convictions on five of them being against s. 13 (1) (a) of the Act of 1958.

Section 13 of the Prevention of Fraud (Investments) Act 1958 provides:

"(1) Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person—(a) to enter into or offer to enter into—(i) any agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting securities . . ."

Counsel for the appellant submits to this court that s. 13 sets out a number of offences, namely, "by any statement inducing somebody, by any promise inducing somebody, or by any forecast inducing somebody", and he also submits that there are further separate offences, namely, "by any dishonest concealment" and "by the reckless making of any statement". Then he says that count 5 is bad because it reads fraudulently induced. Girvin to enter into an agreement by promising orally . . . and by stating . . . and by promising . . . and by stating . . .", so that there are two charges of inducing by promising and two charges of inducing by stating. Counsel contends that the count is bad either for uncertainty or for duplicity.

It is to be noted that those varieties of representations are all joined by the words "and"—"by promising . . . and by stating and by promising . . .

and by stating". In the view of this court the offence which was committed was the offence of inducing another person, namely, Mr. Girvin, to enter into an agreement, and the means by which he was induced to do that were all part of the method of inducing Mr. Girvin to enter into the agreement. Counsel for the appellant has cited to the court two cases, *R. v. Grunwald* (1), in which counsel frankly confesses that this point could have been taken but was not, and *Bastin v. Davies* (2), which was a decision on the Food and Drugs Act 1938, where the court drew a distinction between the words being used disjunctively and the words being used conjunctively. In this case it is sufficient to say that as the words were used conjunctively and as the offence in the view of this court is the offence of inducing, that ground of objection to this count of the indictment is not sustained; it was a perfectly proper setting out of the offence and the method of arriving at the inducement.

There is nothing in any of the grounds which have been argued by counsel today, and this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; Hall, Ward & Fox, Weston-super-Mare.*

T.R.F.B.

- (1) 124 J.P. 495; [1960] 3 All E.R. 380; [1963] 1 Q.B. 935.
(2) 114 J.P. 302; [1950] 1 All E.R. 1095; [1950] 2 K.B. 579.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.J.J., AND JAMES, J.)

July 25, 1969

R. v. MOYLAN

Criminal Law—Sentence—Suspended sentence—Decision to bring into effect—Subsequent trivial offence of different character from that of offence for which sentence imposed—Criminal Justice Act, 1967, s. 40 (1).

A court may properly consider as unjust within the meaning of s. 40 (1) of the Criminal Justice Act, 1967, the activation of a suspended sentence where the new offence is comparatively trivial, particularly when it is in a different category of crime from the category of the offence for which the suspended sentence was imposed.

Criminal Law—Sentence—Curative element—Alcoholic—Sentence within limits of proper sentence for offence.

In a case of dishonesty where there is a background of alcoholism it may be proper to increase the sentence to enable a case to be undertaken while the defendant is in prison, provided that the sentence falls within the limits of a proper sentence for the offence charged, but the sentence must not be increased beyond a sentence within the appropriate range merely in order to provide an opportunity for curative treatment.

APPEAL against sentence by James Edward Moylan.

P. J. Stretton for the appellant.

The Crown did not appear.

WIDGERY, L.J., delivered this judgment of the court: On 29th January 1968 at Walsall Borough Quarter Sessions the appellant was convicted of larceny and sentenced to 18 months' imprisonment suspended for two years. He had apparently been approached by someone else and asked if he would sign for a

television set which was to be delivered to a customer in Blakenhall. He agreed to do this, he was present when the set was delivered and signed for it, and then Whitfield (his associate) took the set away and sold it. In December 1968 he was before a magistrates' court and pleaded guilty to being drunk and disorderly and to wilful damage. He was committed to quarter sessions for sentence, and on 28th January 1969 at Walsall Quarter Sessions the suspended sentence of 18 months imposed a year previously was ordered to take effect, and he was sentenced to one month's imprisonment and three months' imprisonment each consecutive on the charges of being drunk and disorderly and wilful damage to which I have referred. The circumstances of those offences were that he was arrested two days before Christmas in a drunk condition and had been disorderly; and when arrested he told the police that he had broken a window at Walsall bus station, the value of the damage being about £10.

The appellant is a man of 49 and he has been in trouble on a number of occasions; indeed, he is a man who causes a good deal of trouble to the police in a relatively minor way. The only recent sentence of any consequence on him, apart from numerous fines, is the sentence of 18 months' imprisonment. A number of quite important points arise in the course of argument on this matter. Counsel for the appellant has urged that the learned deputy recorder approached this matter in the wrong way by first of all deciding to activate the suspended sentence and then deciding on the appropriate sentence for the instant offences, whereas (as recently laid down in this court) the correct procedure is to consider the matters in the reverse order (*R. v. Ithell* (1)).

But the substantial complaint made on behalf of the appellant is that the learned deputy recorder should not have brought this substantial suspended sentence into effect when the new offence was of such a different character and of a comparatively trivial nature.

One turns then to s. 40 of the Criminal Justice Act 1967 to see what the statutory provisions are. Under s. 40 (1):

"Where an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence . . . then . . . that court shall consider his case and deal with him by one of the following methods:—(a) the court may order that the suspended sentence shall take effect with the original term unaltered; (b) it may order that the sentence shall take effect with the substitution of a lesser term for the original term; . . . (d) it may make no order with respect to the suspended sentence; and a court shall make an order under paragraph (a) of this subsection unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion the court shall state its reasons."

The learned single judge giving leave in this case drew attention to the fact that the new offence which had given rise to this application was a somewhat trivial offence committed by a drunken man, and he thought it appropriate that we should consider whether in those circumstances the activation of the substantial sentence of 18 months for an offence of dishonesty was appropriate.

We think it quite clear that the court may properly consider as unjust the activation of a suspended sentence where the new offence is a comparatively trivial offence and, particularly, where it is in a different category from that for which the suspended sentence was imposed. It is trite to say that every case

(1) Ante p. 371; [1969] 2 All E.R. 449.

depends on its own circumstances, and so it does. But there must be many instances in practice where a relatively minor offence committed in drink can under the terms of the section give rise to the activation of a heavy suspended sentence, and we recognise that it is proper for the court considering the matter to regard this as unjust in an appropriate case. Equally we think that s. 40 in its terms indicates that the activation of a suspended sentence shall be the normal course of committing a further offence punishable with imprisonment. The words I have read made it clear that Parliament intended that that course shall follow unless it is unjust that those consequences should ensue. We think it right, therefore, to say that in this court we should be hesitant to interfere with the order of the court which has followed the line laid down by the Act and has decided to make an order under s. 40 (1) (a), namely, to put the suspended sentence into effect.

However, in this case there is a further factor, and that is that the learned deputy recorder in deciding to do what he did was clearly influenced by the fact that the appellant is given to drink, and he thought that by imposing in the result a substantial sentence he would give the authorities an opportunity to give the appellant treatment for his alcoholism, and thus perhaps to effect a cure. This also is a matter which has recently attracted the attention of this court in *R. v. Ford* (1). This was another case in which the trial judge in imposing sentence had had regard to the alcoholic tendency of the prisoner and had clearly thought it right to impose a sentence of sufficient length to enable treatment to be obtained. In the judgment of this court there appears this final paragraph:

"This court only desires to add one further thing. In relation to offences of dishonesty sentences of imprisonment—except when there is an element of protection of the public involved—are normally intended to be the correct sentence for the particular crime, and not to include a curative element. This court wishes to make it clear that what it is now saying has nothing to do with special cases such as those of possessing dangerous drugs or cases where the protection of the public is involved; but it seems to this court that in the case now under consideration the learned recorder (with the best of intentions) adopted a wrong principle when approaching the question of sentence."

In our judgment, in cases of dishonesty where there is, as it were, a background of alcoholism in respect of the accused the court must first determine what are the limits of a proper sentence in respect of the offences charged. Within those limits it may be perfectly proper to increase the sentence in order to enable a cure to be undertaken whilst the accused is in prison. But on the authority of *R. v. Ford* (1) it is clear that it is not correct to increase the sentence above that within the appropriate range for the offence itself merely in order to provide an opportunity to cure.

We think that in the present case the learned deputy recorder was influenced in his decision by the desire to provide a curative element; whereas he ought first of all to have decided whether it was appropriate to put the suspended sentence into effect at all, and only then to have considered the possibility that a cure might have been undertaken. We are, therefore, for those reasons satisfied that we ought to interfere with the order which was made in the present case. The appellant has served something of the order of seven months in respect of the sentences on him; and we propose to set aside the order below requiring that the suspended sentence should take effect with the original term unaltered and to

substitute under s. 40 (1) (b) an order that the suspended sentence should take effect with the substitution of a term of six months for the original term of 18 months. We cannot say on the information available to us whether the time already spent in custody will satisfy that amended sentence. If it does, then the appellant will be discharged. Those matters must be considered in the light of whether or not he has earned his full remission, and that we do not know. The six months will be consecutive to the sentences imposed on the other charges.

Sentence varied.

Solicitor: *Ernest W. Haden & Stretton*, Walsall.

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ. and JAMES, J.)

July 28, 29, 31, 1969

R. v. LIPMAN

Criminal Law—Manslaughter—Causing death by unlawful act—Intent to constitute unlawful act—Act while under influence of drugs—No distinction from acts during drunkenness.

To support a conviction of manslaughter arising from an unlawful act by the defendant, even if intent has to be proved to constitute the unlawful act, no further specific intent has to be proved to render the offence manslaughter. For the purpose of criminal responsibility there is no distinction between the effect of drugs taken voluntarily and drunkenness voluntarily induced. Accordingly, self-induced overpowering by drugs cannot be a defence to a charge of manslaughter.

The appellant killed a young woman while under the influence of a drug which he had voluntarily taken. His defence was that he had no knowledge of what he was doing and no intention to harm her. The jury were directed that it was sufficient for the Crown to prove that "he must have realised, before he got himself into the condition he did by taking the drug, that acts such as those he subsequently performed and which resulted in the death were dangerous."

HELD: the direction was correct in law.

PER CURIAM: Manslaughter remains a most difficult offence to define because it arises in so many different ways and, as the mental element (if any) required to establish it varies so widely, any general reference to mens rea is apt to mislead.

APPLICATION by Robert Lipman, for leave to appeal against his conviction at the Central Criminal Court before MILMO, J., of the manslaughter of Claudie Delbarre, and the sentence then passed on him of six years' imprisonment, he being also recommended for deportation.

T. M. Eastham, Q.C., and N. R. King for the applicant.

J. C. Mathew and B. L. Leary for the Crown.

29th July. WIDGERY, L.J., delivered this judgment of the court: The applicant and the victim were addicted to drugs and on the evening of 16th September 1967 both took a quantity of a drug known as L.S.D. Early on the morning of 18th September the applicant (who is a United States citizen) hurriedly booked out of his hotel and left the country. On the following day (19th September) Delbarre's landlord found her dead in her room. She had suffered two blows on the head causing haemorrhage of the brain, but she had died of asphyxia as a result of some 8 inches of sheet having been crammed into her mouth.



The applicant was returned to this country by extradition proceedings, and at the trial he gave evidence of having gone with Delbarre to her room and there experienced what he described as an L.S.D. "trip". He explained how he had the illusion of descending to the centre of the earth and being attacked by snakes, with which he had fought. It was not seriously disputed that he had killed the victim in the course of this experience, but he said he had no knowledge of what he was doing and no intention to harm her. He was charged with murder, but the jury evidently accepted that he lacked the necessary intention to kill or to do grievous bodily harm. As to manslaughter, the jury were directed that it would suffice for the Crown to prove that

"... he must have realised, before he got himself into the condition he did by taking the drug, that acts such as those he subsequently performed and which resulted in the death were dangerous."

In this court counsel for the applicant contends that this was a misdirection, and that the jury should have been directed further that it was necessary for the Crown to prove that the applicant had intended to do acts likely to result in harm, or foresaw that harm would result from what he was doing.

For the purposes of criminal responsibility we see no reason to distinguish between the effect of drugs voluntarily taken and drunkenness voluntarily induced. As to the latter there is a great deal of authority. First of all, in *Director of Public Prosecutions v. Beard* (1) there appears the following oft-quoted passage from the speech of LORD BIRKENHEAD:

"Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter: ... the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter."

More recently in two further cases in the House of Lords the same principle is to be found. The first is *Bratty v. A.-G. for Northern Ireland* (2). I quote from the speech of LORD DENNING where he said:

"Another thing to be observed is that it is not every involuntary act which leads to a complete acquittal. Take first an involuntary act which

(1) 84 J.P. 129; [1920] All E.R. Rep. 21; [1920] A.C. 479.

(2) [1961] 3 All E.R. 523; [1963] A.C. 386.

proceeds from a state of drunkenness. If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary; see *Beard's* case (1)."

The other case is *A.-G. for Northern Ireland v. Gallagher* (2), and I cite a passage, again from LORD DENNING, where he said:

"... If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intent, is an answer; see *Beard's* case (1)."

These authorities show quite clearly, in our opinion, that it was well established that no specific intent was necessary to support a conviction for manslaughter based on a killing in the course of an unlawful act and that, accordingly, self-induced drunkenness was no defence to such a charge.

In a case of manslaughter by neglect, however, it has been recognised that some mental element must be established, and for this I turn to *Andrews v. Director of Public Prosecutions* (3). In that case LORD ATKIN dealt in some detail with the mental element involved in manslaughter by neglect. He said:

"LORD ELLENBOROUGH said: 'To substantiate the charge [of manslaughter] the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.' The word 'criminal' in any attempt to define a crime is perhaps not the most helpful, but it is plain that LORD ELLENBOROUGH meant to indicate to the jury a high degree of negligence. So at a much later date in *R. v. Bateman* (4), a charge of manslaughter was made against a qualified medical practitioner in circumstances similar to those of *Williamson's* case (5). In a considered judgment of the court, LORD HEWART, C.J., after pointing out that, in a civil case, once negligence is proved the degree of negligence is irrelevant, said: 'In a criminal court, on the contrary, the amount and degree of negligence are the determining question. There must be *mens rea*.' After citing *Cashill v. Wright* (6), a civil case, LORD HEWART, C.J., proceeds: 'In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable", "criminal", "gross", "wicked", "clear", "complete". But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving punishment'. Here, again, I think, with respect, that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the connotations of *mens rea* helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether, in a particular case, the degree of negligence shown is a crime, and deserves punishment."

(1) 84 J.P. 129; [1920] All E.R. Rep. 21; [1920] A.C. 479.

(2) [1961] 3 All E.R. 299; [1963] A.C. 349.

(3) 101 J.P. 386; [1937] 2 All E.R. 552; [1937] A.C. 576.

(4) 89 J.P. 162; [1925] All E.R. Rep. 45.

(5) (1807), 3 C. & P. 635.

(6) 20 J.P. 678; [1843-60] All E.R. Rep. 629; 119 E.R. 1096.

It is to be observed that in that case there are two references to mens rea; and the next case in which a similar reference is made is *R. v. Church* (1). This seems to be the first case in which a reference to mens rea occurs when the killing was the result of an allegedly unlawful act, and the crucial passage appears in the judgment of EDMUND DAVIES, J. Before I turn to that passage, I should say that in *R. v. Church* (1) the appellant, who threw the unconscious body of the victim into a river where she drowned, pleaded that he thought she was already dead. The jury were directed that if they thought that that was the state of the prisoner's mind the proper verdict was manslaughter, and this direction was criticised by the Court of Criminal Appeal on the ground that on the facts of that case it was equivalent to saying the commission of any unlawful act from which death resulted would be manslaughter. EDMUND DAVIES, J., said this of that direction:

"It amounted to telling the jury that, whenever any unlawful act is committed in relation to a human being which resulted in death there must be, at least, a conviction for manslaughter. This might at one time have been regarded as good law: see, for example, *R. v. Fenton* (2). It appears to this court, however, that the passage of years has achieved a transformation in this branch of the law and, even in relation to manslaughter, a degree of mens rea has become recognised as essential. To define it is a difficult task, and in *Andrews v. Director of Public Prosecutions* (3) LORD ATKIN spoke of 'the element of "unlawfulness" which is the elusive factor'. Stressing that we are here leaving entirely out of account those ingredients of homicide which might justify a verdict of manslaughter on the grounds of (a) criminal negligence, or (b) provocation or (c) diminished responsibility, the conclusion of this court is that an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm."

This passage forms the basis of the applicant's submission before us, namely, that by 1965 (the date of *R. v. Church* (1)) it had become recognised that guilt of manslaughter derived from the accused's having intended or foreseen that some harm should befall the victim as a result of his action. It is accepted in this argument that at that time the so-called objective test was applied to the state of the accused's mind, so that the issue was concluded against him if ordinary sober and reasonable people would recognise that harm was likely to be caused. But it is nevertheless maintained that the theoretical basis of guilt was the accused's supposed intent or foresight.

The final step in the argument is that s. 8 of the Criminal Justice Act 1967 has replaced the objective test by a subjective one, so that the jury are now required to consider the actual state of the accused's own mind at the relevant time. Section 8 is in these terms:

"A court or jury, in determining whether a person has committed an offence—(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend

(1) 129 J.P. 366; [1965] 2 All E.R. 72; [1966] 1 Q.B. 59.

(2) (1830), 1 Lew. C.C. 179.

(3) 101 J.P. 386; [1937] 2 All E.R. 552; [1937] A.C. 576.

or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

If the applicant's argument be sound, it follows that we have come a long way since *Director of Public Prosecutions v. Beard* (1) and that events have moved very fast. In our judgment, there is a flaw in the applicant's argument; and the flaw lies in the assumption that *R. v. Church* (2) introduced a new element of intent or foreseeability into this type of manslaughter. All that the judgment in *R. v. Church* says in terms is that whereas, formerly, a killing by any unlawful act amounted to manslaughter, this consequence does not now inexorably follow unless the unlawful act is one in which ordinary sober and responsible people would recognise the existence of risk. The development recognised by *R. v. Church* relates to the type of act from which a charge of manslaughter may result, not in the intention (real or assumed) of the prisoner. It is perhaps unfortunate that a reference to mens rea, which had been found unhelpful by LORD ATKIN, was repeated in *R. v. Church*, and to give it the effect now contended for would be contrary to *Director of Public Prosecutions v. Beard* (1) and the other authorities which we have cited. The decision in *R. v. Church* was referred to in this court later in *R. v. Lamb* (3) where the accused had pointed a revolver at the victim in the belief, as he said, that there was no round in the chamber, but the revolver had fired and the victim was killed. It was pointed out in this court that no unlawful act on the part of the prisoner had been proved in the absence of the necessary intent to constitute an assault. But this is intention of a different kind. Even if intent has to be proved to constitute the unlawful act, no specific further intent is required to turn that act into manslaughter. Manslaughter remains a most difficult offence to define because it arises in so many different ways and, as the mental element (if any) required to establish it varies so widely, any general reference to mens rea is apt to mislead.

We can dispose of the present application by reiterating that when the killing results from an unlawful act of the accused no specific intent has to be proved to convict of manslaughter, and self-induced intoxication is accordingly no defence. Since in the present case the acts complained of were obviously likely to cause harm to the victim (and did, in fact, kill her) no acquittal was possible and the verdict of manslaughter, at the least, was inevitable.

If and so far as this matter raises a point of law on which the applicant was entitled to appeal without leave, such appeal is dismissed.

On the question of sentence we think the sentence was fully justified to bring home the grave consequences which may result from the taking of drugs of this kind. Accordingly, both applications for leave to appeal against conviction and sentence are refused.

Appeal dismissed.

Solicitors: *Kingsley, Napley & Co.; Director of Public Prosecutions.*

T.R.F.B.

(1) 84 J.P. 129; [1920] All E.R. Rep. 21, [1920] A.C. 479.

(2) 129 J.P. 366; [1965] 2 All E.R. 72; [1966] 1 Q.B. 59.

(3) [1967] 2 All E.R. 1282; [1967] 2 Q.B. 981.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., COOKE AND BRIDGE, JJ).

June 30, 1969

POTTER v. GORBOULD AND ANOTHER

Road Traffic—Goods vehicle—Driver—Period of rest—Work on voluntary basis—Overtime work in employers' scrap yard cutting metal—Work within general contract between driver and employers—Road Traffic Act, 1960, s. 73 (1) (iii).

The first defendant was the driver of a goods vehicle owned by the second defendants, his employers. There was an agreement between the second defendants and their employees that any employee, after his normal day's work and if he so desired, could work in the employers' scrapyard cutting up scrap and thereby earn overtime. The first defendant, of his own free will and without any specific request from the second defendants, but with their implied consent, after driving his vehicle for 12 hours in one day, worked a further 3½ hours cutting up scrap metal. This meant that in a period of 24 hours he had less than 10 hours for rest, as prescribed by s. 73 (1) (iii) of the Road Traffic Act, 1960. Informations were preferred against the first defendant for driving a goods vehicle without having 10 consecutive hours of rest in a 24-hours period contrary to s. 73, and against the second defendants for permitting the driver to commit the offence. Justices dismissed the informations. On appeal by the prosecutor.

HELD: as the overtime work was equally for the benefit of the driver and his employers and wholly within the terms of the general contract between them, the time spent on that work could not count as part of the rest period, and the case must be remitted to the justices with a direction of convict in each case.

CASE STATED by justices for Mitford and Launditch, Norfolk, sitting at East Dereham.

On 28th May 1968 informations were preferred by the appellant, Kenneth Ivan Potter, against the respondents, Dennis Gorbould and Haller & Sons (Dereham), Ltd., charging that Gorbould, on Monday 26th February, 1968, at Scarning unlawfully drove a motor vehicle constructed to carry goods so that he did not have at least ten consecutive hours for rest in a period of 24 hours calculated from the commencement of a period of driving starting at 1.30 a.m. on Monday 26th February 1968, and that on Monday 26th February, 1968, at Scarning, Messrs. Halter unlawfully permitted Gorbould, a person employed by them or subject to their orders, to drive a motor vehicle constructed to carry goods so that the driver did not have at least ten consecutive hours for rest in a period of 24 hours calculated from the commencement of a period of driving starting at 1.30 a.m. on Monday 26th February 1968, in both cases contrary to s. 73 of the Road Traffic Act 1960.

M. A. B. Burke-Gaffney for the appellant.

J. G. Marriage for the driver and the employers.

LORD PARKER, C.J., having stated the facts as summarised in the head-note, continued: This is not an easy point because the wording of s. 73 is far from clear. Having by sub-s. (1) set out the vehicles to which the section applied and that the general object of the section was to protect the public

"... against the risks which arise in cases where the drivers of motor vehicles are suffering from excessive fatigue ...",
it went on to provide that it was an offence

"for a person to drive or cause or permit a person employed by him or subject to his orders to drive—(i) for any continuous period of more than five hours and one half, or (ii) for continuous periods amounting in the aggregate to more than eleven hours in any period of twenty-four hours

commencing two hours after midnight, or (iii) so that the driver has not at least ten consecutive hours for rest in any period of twenty-four hours calculated from the commencement of any period of driving."

Let me say at once that it has been held not only under this Act but under previous Acts that the obligation here is to ensure that there are ten consecutive hours for rest and it is not to ensure that a driver does have ten consecutive hours of rest. Provided he has the ten hours which he can use for rest, that *prima facie* is sufficient to comply with the Act. But the matter does not end there because in sub-s. (4) of this section provision is made for certain operations which are deemed still to be the driving of the vehicle, and then goes on in these terms:

"... and for the purposes of the provisions of this section which relate to the number of consecutive hours for rest which a driver is to have in a specified period, time during which the driver is bound by the terms of his employment to obey the directions of his employer, or to remain on or near the vehicle, or during which the vehicle is at a place where no reasonable facilities exist for the driver to rest away from the vehicle, shall be deemed not to be time which the driver has for rest."

The question involved here is what effect is to be given to those words when under the general terms of employment there is a clear option to work this overtime resulting in less than ten hours' rest. A very similar matter came before this court in *Witchell v. Abbott* (1). In that case in the general terms of the driver's employment he was at liberty to spend his hours of rest in the town at which the journey ended, and in that event a subsistence allowance of £1 per night was given to him. Alternatively, if he so desired, and this was entirely for his own benefit, he could return to his home and his family by a relief car provided by the employer, and during that period he would be paid at the hourly rate for the time occupied in travelling. The matter was a little further complicated because sometimes on that journey home in the relief vehicle he himself drove the relief vehicle. The court was quite satisfied that it was not, as it were, a sham, and that he was really compelled to go back to his home, but that he had a clear option whether to stay in the town where the journey ended and get the subsistence allowance, or travel back to his wife and family getting the hourly rate for the journey. The matter in issue in that case was whether, when he did exercise the option to travel back in the relief vehicle and himself drove it, he was bound by the terms of his employment to obey the directions of his employer. It was argued that, it being his employers' vehicle, he was bound to obey any instructions when driving it which the employer chose to lay on him, but this court held that that was not so in the particular circumstances of that case in that his journey home was something which he was doing entirely for his own benefit and in no way for the benefit of the employer. So far as the employer was concerned, he was just as content for the man to stay in the town where the journey ended and draw his subsistence allowance.

It was in those circumstances held that what the driver was doing when driving the relief vehicle was not part of the regular terms of his employment. That is the approach which should be made in the present case, but the difference in the present case is that what the driver did here when he exercised the option was not something purely for his benefit, but was something equally for the benefit of the employers and wholly within the terms of the general contract between the employers and the driver. In my judgment, approaching this on the basis of *Witchell's* case (1) there is really only one answer, and that is

(1) 130 J.P. 297; [1966] 2 All E.R. 657.

that both the driver and the employers are guilty. I would only add that the justices were never referred to *Witchell's* case. If I felt that the application of *Witchell's* case centred on further findings of fact, I should feel compelled to send the case back to the justices, but in my judgment sufficient facts here are found, and based on those facts and applying *Witchell's* case, I would send this case back to the justices with a direction to convict in each case.

COOKE, J.: I agree with LORD PARKER, C.J.'s judgment and with the order which he proposes.

BRIDGE, J.: I also agree.

Case remitted.

Solicitors: *Treasury Solicitor; Hill & Perks, Norwich.*

T.R.F.B.

COURT OF APPEAL (CRIMINAL DIVISION)

(WIDGERY AND FENTON ATKINSON, L.JJ., AND JAMES, J.)

July 14, 15, 16, 17, 18, 21, 22, 24, 1969

R. v. KRAY AND OTHERS

Criminal Law—Indictment—Joinder of counts—Series of offences—"Series"—

Two offences—Offences exhibiting similar features—Joint trial—Prima facie case established that offences may be properly and conveniently tried together—Two murders—When joint trial desirable—Indictments Act, 1915, Sch. 1, r. 3.

By r. 3 of Sch. 1 to the Indictments Act, 1915, "Charges for any . . . misdemeanours may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character."

Two offences may constitute a "series" within the meaning of this rule, and the requirements of the rule are satisfied if the offences exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together.

Two charges of murder may in appropriate circumstances be joined in one indictment and tried together. The judge, in exercising his discretion whether or not to order separate trials, must recognise the inevitable prejudice which is created where a defendant has to face two charges of murder instead of one, but such a consideration is not conclusive where the two cases exhibit unusual common features which render a joint trial desirable in the general interests of justice, regard being had to the interests, not only of the defendant, but also to those of co-defendants, the Crown, witnesses and the public.

APPLICATIONS for leave to appeal against convictions and sentences.

At a trial at the Central Criminal Court before MELFORD STEVENSON, J., the applicants Ronald Kray, Reginald Kray, Charles James Kray, Cornelius John Whitehead, Christopher Lambrianou, Anthony Lambrianou, Ronald A. Bender, Frederick Gerald Foreman and John Alexander Barrie were convicted as follows: Count 1, Ronald Kray and John Barrie of the murder of one George Cornell in March 1966; count 2, Reginald Kray of being an accessory after the fact to that murder; count 3, Ronald and Reginald Kray, Christopher and Anthony Lambrianou, and Ronald Bender of the murder of one Jack McVitie in October 1967; count 4, Charles Kray, Frederick Foreman, Cornelius Whitehead of being accessories after the fact to McVitie's murder. One Donaghue, who did not apply for leave to appeal, pleaded guilty to the charge in count 4 and one Anthony Barry was acquitted on the charge in count 3.

The applicants applied for leave to appeal against conviction, and, in addition, Reginald Kray applied for leave to appeal on count 2 and Charles Kray, Cornelius Whitehead and Frederick Foreman on count 4, all against their sentences as accessories. The case is reported only on the question whether the trial judge had been wrong to refuse to order separate trials on counts 1 and 2 and counts 3 and 4 in respect of Ronald and Reginald Kray.

Insofar as the construction of r. 3 of Sch. 1 to the Indictments Act 1915 involved a point of law on which either of the applicants Ronald and Reginald Kray could appeal without leave the court treated the hearing of the application as the hearing of the appeals.

J. F. F. Platts-Mills, Q.C., and *I. J. Lawrence* for Ronald Kray; *Paul Wrightson, Q.C.*, and *M. Sherborne* for Reginald Kray; *D. H. W. Vowden, Q.C.*, and *P. M. Pakenham* for Charles Kray; *Sir Lionel Thompson* for Whitehead; *W. G. Fordham, Q.C.*, and *Patricia Coles* for Christopher and Anthony Lambrianou; *William Denny* for Bender; *C. Lawson, Q.C.*, and *I. S. Richard* for Foreman; and *R. H. K. Frisby, Q.C.*, and *F. G. R. Ward* for Barrie.

Kenneth Jones, Q.C., *H. J. Leonard, Q.C.*, and *C. J. Crespi* for the Crown.

Cur. adv. vult.

July 22, 1969. **WIDGERY, L.J.**, delivered this judgment of the court: These applications arise out of a trial lasting 40 days at the Central Criminal Court before **MELFORD STEVENSON, J.**, and a jury. They concern two alleged murders, one of George Cornell on 9th March 1966 and the other of Jack McVitie on 29th October 1967. The case for the Crown was that the twin brothers Ronald and Reginald Kray were the leaders of an association of men with criminal records operating in the East End of London and known locally as the Kray "firm". The Crown did not attempt to particularise the activities of this so-called firm, but in the course of the trial witnesses spoke of its having demanded money by menaces from shop and club proprietors, the menaces consisting of threats of physical violence.

On the evening of 9th March 1966 the twin brothers Ronald and Reginald were drinking with a number of their associates in a public house called The Lion, from which Ronald Kray and the applicant Barrie drove to another public house nearby called The Blind Beggar where, according to the barmaid, Ronald shot Cornell in cold blood whilst the latter was drinking with others in the bar, Barrie firing another gun at random to divert attention from Ronald Kray. Ronald Kray and Barrie returned to The Lion, whereupon several witnesses spoke of an immediate exodus of the Kray twins and their friends (some eight in number) to another public house called The Chequers in Walthamstow. The Crown alleged that Ronald Kray and Barrie thereafter went into hiding, and that Reginald Kray had taken a leading part in organising both the flight to Walthamstow and the subsequent concealment with a view to protecting his brother and Barrie.

McVitie disappeared at the end of October 1967, and his body has never been found. The Crown alleged that he was killed with a knife in a basement flat at no. 97, Evering Road, N.16, by Reginald Kray with the active assistance of Ronald Kray and others. McVitie was seen shortly before midnight on 29th October at the Regency Club, owned by John Barrie and Anthony Barry, which was often used by members of the Kray firm. The witness Hart, who turned Queen's evidence, said that he arrived at the Regency Club with the Kray twins and the applicant Bender and heard Reginald Kray tell Anthony Barry that he intended to kill McVitie that night. Hart saw a gun in Reginald Kray's hand. Hart further testified that Anthony Barry protested that he did not want the killing

to take place at the club, whereupon a party was arranged at no. 97 Evering Road with a view to McVitie's being decoyed to that address. The Kray twins left for Evering Road and, according to the Crown's case, Anthony Lambrianou was instructed to wait at the Regency Club to get McVitie drunk and bring him to the party. Meanwhile the gun and a knife said to have been produced by Bender were left in the possession of Anthony Barry, who was later instructed by Hart to take the gun to Evering Road, which he did. In due course McVitie went from the Regency Club to no. 97 Evering Road in the company of the Lambrianou brothers and was there brutally murdered by Reginald Kray with the knife, the gun having failed to fire. Following the killing the Kray twins left, and their associates disposed of the body and cleaned up the flat to remove all traces of the affair. That is a very brief summary of the Crown case in these matters.

Separate committal proceedings were held in respect of each murder, and two indictments were laid. Instead of proceeding on these indictments, however, a voluntary bill was preferred which charged the various applicants as follows: count 1, Ronald Kray and Barrie with the murder of Cornell; count 2, Reginald Kray with being an accessory after the fact to this offence; count 3, Ronald Kray, Reginald Kray, the Lambrianou brothers, Bender and Anthony Barry with the murder of McVitie; and count 4, Charles Kray, the applicant Foreman, the applicant Whitehead and one Donaghue as accessories after the fact of the murder of McVitie. Donaghue pleaded guilty to count 4 and Anthony Barry was acquitted on count 3; the remainder were convicted as charged.

The defence of Ronald Kray and Barrie on count 1 was a denial of any association with the murder of Cornell. They admitted that they had been drinking at The Lion and that they had later gone to The Chequers at Walthamstow, but explained that they did this on hearing that the murder had been committed and for fear of being suspected of complicity. Reginald Kray gave no evidence on either count 2 or count 3. On count 3 Anthony Barry admitted the substance of the Crown case against him, but contended that in taking the gun from the Regency Club to Evering Road he had acted under duress. Ronald Kray gave no evidence as to his movements on the night of 28th/29th October but denied any knowledge of the murder of McVitie. The remaining accused on this count also denied any knowledge of the murder, although some admitted having been in the Regency Club that night, and Bender admitted having been to no. 97 Evering Road.

I now turn to deal with the applications of Ronald Kray and Reginald Kray for leave to appeal against their convictions. Two complaints common to these applications were: (a) that the judge wrongly refused applications made before the trial began and repeated later that separate trials should be held on counts 1 and 2 and counts 3 and 4, respectively; and (b) that the applicants were prejudiced by the manner in which Anthony Barry was allowed to develop his defence of duress. Both applicants contend that the joinder of the two offences of murder in one indictment was contrary to law, or, alternatively, that the judge wrongly exercised his discretion to continue the trial without severance and thus gave rise to a miscarriage of justice. It was accepted in argument before us that the joinder of these offences was contrary to law unless authorised by r. 3 of Sch. 1 to the Indictments Act 1915, which is in these terms:

"Charges for any . . . misdemeanours may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

Counsel for Ronald Kray contended that two murders cannot amount to a

"series" of offences since a series, he says, involves at least three components. Counsel for Reginald Kray did not support this argument, but he contended that r. 3 was no more than a consolidation of earlier rules of practice which did not sanction the joinder of offences unless they arose out of the same facts or were part of a system of conduct, which was not here alleged.

The court does not accept either of these arguments. It may be true that the word "series" is not wholly apt to describe less than three components, but so to limit its meaning in the present context would produce the perverse result that whereas three murders could be charged in the same indictment two could not. The construction of the rule has not been restricted in this way in practice during the 50 years which have followed the passage of the Act and it is too late now to take a different view.

On the other hand, offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is not restricted to such cases. Thus in *R. v. Clayton-Wright* (1) the accused was convicted on four counts, namely, arson of a vessel; arson of the same vessel with intent to prejudice the insurers; attempting to obtain money by false pretences from those insurers in respect of a policy on the vessel; and attempting to obtain money by false pretences from insurers by falsely pretending that a mink coat had been stolen from his motor car. On appeal it was unsuccessfully contended that the fourth count was improperly joined. LORD GODDARD, C.J., said:

"One test which the learned judge applied was to consider whether or not the evidence with regard to the mink coat could be given in evidence on the other charges. He came to the conclusion that it could, and, in the opinion of the court, he came to a right conclusion . . . That was one ground, but the main ground on which the court holds that there was no misjoinder is the following. The charge contained in the first three counts . . . in substance was that the appellant fired the yacht with the idea of swindling underwriters. The charge with regard to the mink coat was a similar charge of swindling underwriters, and, therefore, one gets what I may call the nexus of insurance, the nexus of fraudulent acts to the prejudice of the underwriters . . ."

It is not desirable, in the view of this court, that r. 3 should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a *prima facie* case that they can properly and conveniently be tried together. As appears later this was true in the present case.

When the judge came to exercise his discretion to sever the indictment he had to recognise—and we think that he did recognise—the inevitable prejudice which is created where an accused has to face charges of two murders instead of one. Nevertheless this consideration is not conclusive where the two cases exhibit unusual common features which render a joint trial desirable in the general interests of justice, regard being had to the interests, not only of the accused in question, but also of others accused, the Crown, the witnesses and the public. These two cases did exhibit such features, the two murders having many unusual factors in common. Thus each was committed in cold blood and without obvious

(1) 112 J.P. 428; [1948] 2 All E.R. 763.

motive; each bore the stamp of a gang leader asserting his authority by killing in the presence of witnesses whose silence could be assured by that authority. Neither killing would have been possible except on the basis that members of the "firm" would rally round to clear up the traces and secure the silence of those who might give the offender away. All these factors made it desirable in the public interest that these two unusual cases should be examined together, and this was also in the interests of one of the accused, namely, Anthony Barry. Finally, the interest of the Press in this affair was so great that if the two murders had been tried separately the publicity attending the first trial would have made a fair trial of the remaining charges impossible. We are accordingly satisfied, not only that this joinder came within the terms of r. 3, but also that there is no reason to suppose that the trial judge erred in the exercise of his discretion in refusing to sever the trial of these charges.

[His LORDSHIP having considered the submissions relating to the effect on Ronald and Reginald Kray of the defence of Anthony Barry of duress and of other matters not material to this report, continued:] This court is quite satisfied that there is no reason to suppose that the convictions of Ronald Kray and Reginald Kray were unsafe or unsatisfactory, and their applications for leave to appeal against conviction are therefore refused. Insofar as the construction of r. 3 involves a point of law on which either applicant could appeal without leave, such appeal is dismissed.

Applications refused.

Solicitors: *Sampson & Co.; Baldwin, Mellor & Co.; Bryan J. C. Gammon & Co.; Nelson Mitchell & Williams, Southend-on-Sea; Tringhams; Claude Hornby & Coz; Director of Public Prosecutions.*

T.R.F.B.

CHANCERY DIVISION

(PENNYCUICK, J.)

May 14, 15, 1969

Re F. (W.), an infant

Magistrates—Jurisdiction—Decision on first summons—Second summons—No fresh relevant evidence—Application of res judicata doctrine.

Early in 1965 the mother of an infant was married, but she and her husband separated at the end of 1966. The infant was born on October 6, 1967. Alleging that her husband was the father of the infant, which the husband denied, the mother took out a summons under the Guardianship of Infants Acts for the custody and maintenance of the infant. At the hearing of this summons on May 20, 1968, the only evidence given was that of the mother and the husband. It was very contradictory, but the justices concluded that the husband's evidence was the more reliable and made no order on the summons. Some months later the mother took out a second summons against the husband for the custody and maintenance of the infant. On Feb. 17, 1969, this summons came before different justices who were fully informed about the hearing of the first summons, but proceeded to hear the second summons. The only evidence given was that of the mother and the husband and was in all relevant respects the same as that given at the first hearing, but an order was made granting custody of the infant to the mother and ordering the husband to pay maintenance. On appeal by the husband on the ground, *inter alia*, that the matters arising on the first summons concerning the paternity of the infant were *res judicata* and the justices had no jurisdiction to entertain a second identical summons,

HELD: the matters arising on the first summons were not made *res judicata* by the decision of the justices and the mother was not estopped from taking out a second summons which the justices had jurisdiction to entertain, but the proper practice was that they should have stopped the hearing as soon as they became aware that no further evidence was to be adduced and that the only evidence to be had on behalf of the mother was that which had been given at the hearing of the first summons; accordingly the appeal would be allowed and the order of the justices dated Feb. 17, 1969, set aside.

APPEAL by the husband from an order of justices dated 17th February 1969 granting custody to the mother of an infant born on 6th October 1967, and ordering the husband to pay maintenance. Judgment was delivered in open court.

The husband appeared in person.

Robin Webb for the mother.

PENNYQUICK, J.: I have before me an appeal from an order made on 17th February 1969 by the justices of a certain petty sessional division. The appeal raises a novel point of practice and I think it right for that reason to give judgment in open court. I will endeavour to do so in such a way that it will be impossible to identify the parties.

The appeal relates to an infant. The respondent to the appeal is the infant's mother. The appellant is the husband of the infant's mother. The facts, so far as now relevant, are these. The husband and the mother were married early in 1965 and they separated late in 1966. Then there was before the justices a conflict of evidence. According to the mother, the husband visited her regularly from about Christmas 1966 until the day when the infant was born. According to the husband, he did not visit her in 1967 until the middle of that year, and thereafter he visited her regularly until the infant was born. According to the mother, intercourse regularly took place on the occasions of his visits. According to the husband no intercourse took place on those occasions. The infant was born on 6th October 1967. It will be immediately clear that, if the mother's account was correct, the husband could have been the father of the infant, but if the husband's account was correct that would be impossible.

I now come to the special feature of this case. The mother took out a summons under the Guardianship of Infants Acts relating to the infant. That summons came before the justices on 20th May 1968. The only evidence on that summons was given on the one side by the mother and on the other side by the husband. I need not go into that evidence; I have summarised in the opening the one critical feature in the evidence. Having heard the evidence, the justices gave their reasons in these terms:

"Both parties having given very contradictory evidence on oath, the justices considered the matter very carefully and came to the definite conclusion that the evidence given by the [mother] was not reliable while that of the [husband] was, and for this reason they decided to make no order"

and their decision was, no order made. The mother gave notice of appeal against that decision, but subsequently her solicitors, on her behalf, signed a notice in the usual form consenting to the appeal being dismissed. No formal order was drawn up dismissing the appeal, but, pursuant to that consent, the appeal has been treated as dismissed. The consent was duly initialled by myself in accordance with the usual practice.

Then the mother took out a second summons under the Guardianship of Infants Acts seeking once again an order for custody and maintenance of the infant. That second summons came on for hearing on 17th February 1969. It appears from the signatures on the documents relating to the two summonses

that the appeal was heard by a different bench of justices. I mention that because the husband's recollection is that the justices were the same. In that, I feel, he must be mistaken. On the hearing of the second summons on 17th February, the mother was represented by counsel and the husband appeared in person. A request has been made on the telephone to the solicitors who then represented the mother for information as to what was put before the court with regard to the first summons. That was done with the consent of the husband. According to the information received on the telephone, counsel did give the justices full information concerning the hearing of the first summons. I mention that because again that does not tally with the husband's recollection. On that point I again feel he must be wrong, it being inconceivable that counsel should not have mentioned the first summons. The husband, as I understand it, objected to the summons proceeding, and exactly what was said I do not know, but the justices did proceed to hear the second summons. Thereupon the mother proceeded to give evidence, and her evidence was in all relevant respects to the same effect as that which she gave on the first summons. I need not go into the notes of evidence in detail, because it is not suggested on her behalf that there was any material difference in her evidence on the two occasions. The husband then gave evidence, again broadly to the same effect as that which he gave on the first summons. On this occasion, the justices took a different course and they made an order granting custody to the mother and directing the husband to pay maintenance at £2 a week. They subsequently found the following facts:

"1. The parties were married on [a certain date]. 2. They subsequently separated [they then referred to an earlier maintenance order]. 3. A reconciliation took place in December of that year but [the mother] left [the] husband to live at her present address [in] December 1966. She alleged that [the] husband visited her every evening thereafter until October 1967. He said that he did not visit her until Whitsun of 1967. 4. On the 6th October 1967 [the mother] gave birth to the [infant], of whom she alleged [the husband] was the father. [The husband] denied that intercourse had ever taken place since marriage. 5. Neither party called any witnesses. We were not completely convinced by the evidence of either party but the presumption that the parties to a marriage are, in the absence of evidence to the contrary, parents of any child of the marriage, led us to find in favour of [the mother]."

And they made their order for custody and maintenance. By the present notice of appeal, the husband relies on the following grounds:

"(i) That on 20th May 1968 the Magistrates for the said Petty Sessional Division . . . dismissed an identical complaint made by the [mother]. By Notice of Motion dated 7th June 1968 the [mother] appealed to this Honourable Court against this decision but did not proceed with her appeal which was thereafter struck out. In the premises the matters arising upon this said first complaint, and in particular the paternity of the said infant, were res judicata between the parties, and the Magistrates had no jurisdiction to entertain a second identical complaint. (ii) The Magistrates were wrong in law in failing to pay any or any sufficient regard to the said prior determination of 20th May 1968; and in reaching a conclusion directly conflicting with the same upon the evidence of the same parties and without any additional evidence. (iii) That the decision of the Magistrates was against the weight of the evidence."

That appeal now comes before me. The mother was represented by counsel, who gave me the greatest assistance in taking me through the law relating to res judicata and kindred matters. The husband until a few days ago was legally represented and counsel had been briefed to appear on his behalf, but he decided at the last moment to jettison his legal advisers and to conduct his case in person. He was, of course, perfectly entitled to do so, but it was, to my mind, a regrettable decision and it has made the case much more difficult for me to decide.

I will take in order the points raised by the notice of appeal. The first deals with res judicata. The law relating to res judicata will be found set out in 15 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) at pp. 184 et seq., in a lengthy passage. There is no doubt that the present case contains many of the elements which go to make up res judicata between two parties. However, counsel referred me to a line of authorities which make it perfectly clear to my mind that the principle of res judicata is not applicable in the present case. I will refer shortly to two of those cases. The first is *R. v. Sunderland Justices, Ex p. Hodgkinson* (1) in the Divisional Court. That was an application by a woman for an affiliation order against a man who was not her husband. What had happened was that she applied to the Sunderland justices for an order in bastardy. The justices, after hearing evidence, dismissed the complaint on the merits. Then she issued a second complaint on fresh evidence and the question arose whether the justices had jurisdiction to hear that application. HUMPHREYS, J., delivered a careful reserved judgment. He referred to certain earlier authorities, in particular, *R. v. Machen* (2) and *Ex p. Westerman* (3). The effect of those cases was summarised in the second case in the headnote in these words:

"A second application may be made for an order of affiliation, although the first was dismissed on the merits after a full examination . . ."

He then referred to *R. v. Harrington* (4), in which SIR ALEXANDER COCKBURN, C.J., is reported as saying:

"If there has been a hearing upon the merits, and a dismissal upon the merits, and if that be brought to the notice of the justices upon a second application, and there is no other evidence produced, I think that ought to be a sufficient answer, and if in this case it had been brought to the attention of the justices that the case had before been dismissed upon the merits, and that there was no other evidence in support of the application than was before submitted to them, I should have been disposed to give effect to the present application."

HUMPHREYS, J., said:

"I myself would not hold that justices are bound to hear a second application founded solely upon evidence already heard by the court and held by them to be insufficient."

He then, after going through a number of other cases, said:

"Upon a consideration of the authorities, I am of opinion that the justices in this case had jurisdiction to hear the second complaint of Margaret Brown and, on fresh evidence being produced, as it was, to make the order in question."

OLIVER, J., said this:

"I have had an opportunity of reading the judgment that my Lord has just pronounced, and I desire to say that I entirely agree with it and would

(1) 109 J.P. 201; [1945] 2 All E.R. 175; [1945] K.B. 502.

(2) (1849), 14 Q.B. 74.

(3) (1851), 16 L.T.O.S. 420.

(4) (1864), 28 J.P. 485.

seek to add only one word. Technically there is nothing to prevent an application being re-heard in certain cases. That right, however, should obviously only be exercised in cases where there is fresh evidence of a serious kind. It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision."

A similar point came before the Queen's Bench Divisional Court in *Robinson v. Williams* (1). In that case the court applied the decision in *R. v. Sunderland Justices, Ex p. Hodgkinson* (2). LORD PARKER, C.J., said:

"So far as the first point is concerned, I find myself, and I treat myself, as bound by the decision of this court in *R. v. Sunderland Justices, Ex p. Hodgkinson* (2), a decision of HUMPHREYS and OLIVER, J.J., sitting as a Divisional Court, which reviewed the cases on the matter. They came to the clear conclusion that justices had jurisdiction to hear an application by a woman for an affiliation order after a refusal of a previous application on the merits, and to make the order if fresh evidence is adduced by the applicant."

He went on to consider the basis of that jurisdiction, and said: "... it is perfectly fair to look on this as in the nature of a non-suit". The reasons for that statement should be read in the judgment and I do not think it would be useful to go into them further for present purposes. Then he said:

"The second, and really more difficult question as it seems to me, is whether, in order to give the justices jurisdiction to determine a second complaint on the merits, there must be fresh evidence according to the, as it has been said, hallowed usage of that word; according to the general principles on which appellate courts have determined whether or not evidence is fresh evidence. In my judgment, the justices do have jurisdiction on a second complaint if the evidence before them is new evidence in the sense that it was evidence not called on the previous complaint, even though it was available."

Then WIDGERY, J., said:

"The cases all now show that the fact that justices have refused to make an order in favour of the mother on an earlier occasion does not create any estoppel in the event of her seeking to obtain an order against the same man on a subsequent occasion. It is quite clear that the facts are not res judicata, and there is no provision in any statute which requires either that fresh evidence or additional evidence should be produced on a second or subsequent application. In my judgment the only reason why fresh or additional evidence is required in practice is the reason given by OLIVER, J., at the end of his judgment in *R. v. Sunderland Justices, Ex p. Hodgkinson* (2), when he said: 'It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision'. If the justices are invited in effect to reverse a previous decision of their own on the same grounds and the same evidence, they would obviously take OLIVER, J.'s direction. If, however, the evidence is different in the sense that it raised different considerations and justifies a re-assessment, it seems to me proper for the justices to embark on a second consideration of the matter."

(1) 128 J.P. 516; [1964] 3 All E.R. 12; [1965] 1 Q.B. 89.

(2) 109 J.P. 201; [1945] 2 All E.R. 175; [1945] K.B. 502.

JOHN STEPHENSON, J., agreed.

Those decisions are conclusive that the first decision does not make the matter *res judicata*; and they are conclusive that on the second hearing new evidence may be called, notwithstanding that the new evidence is such that it would have been available on the first occasion. But throughout the judgments in both cases there runs the clear thread that it is not right for justices to entertain the same application on a second occasion merely on the same evidence as was adduced on the first occasion. That is brought out in strong terms by OLIVER, J., in *R. v. Sunderland Justices, Ex p. Hodgkinson* (1) where he said:

"That right [that is, to re-hear], however, should obviously only be exercised in cases where there is fresh evidence of a serious kind. It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision."

And again in *Robinson v. Williams* (2) LORD PARKER, C.J., putting, I think, the basis of the jurisdiction, said: "... the justices do have jurisdiction on a second complaint if the evidence before them is new evidence ..." in the sense which he indicates. Finally, WIDGERY, J., said that if only the same evidence is adduced on the second as on the first occasion the justices "... would obviously take OLIVER, J.'s direction". These were cases in which a woman sought an affiliation order against a man who was not her husband. In the present case there is this difference, namely, that the man and the woman were husband and wife, but for present purposes I do not think that that can make any difference.

I think that it is probably right to relate the statements quoted above as to hearing the same case on the same evidence to the broad principle on which the principle *res judicata* is based, namely, that it is in the public interest that there should be an end to litigation, and that nobody should be troubled twice by the same case.

Turning back to the present case, it is easy to be wise after the event, but it seems to me that, if counsel for the mother at the second hearing (that was a different counsel from counsel who appeared before me today) had fully appreciated the effect of the decisions on those points and knew, as he must have known, that he was only going to lead on behalf of the mother exactly the same evidence as had been led on her behalf last time, he ought to have so informed the justices, and he ought to have informed them of the effect of the authorities. If he had done so, it is quite inconceivable that the justices would have disregarded the direction of OLIVER, J., and insisted on continuing to hear the case. Again, it is easy to be wise after the event, but if the justices, at the conclusion of the mother's case, had appreciated the legal position as laid down in the authorities, they would at that stage have stopped the case on precisely the same ground. In fact, the effect of those authorities was evidently not brought to their notice, and they proceeded to hear the case through and reach a different conclusion.

It seems to me that it would not be right in those circumstances to allow the decision of the justices to stand. The position is that, although they had jurisdiction to entertain the second application, they ought not to have continued to hear it as soon as they became aware that no evidence was being led on behalf of the mother other than had been before the justices on the prior occasion. I say that they ought to have taken that step; I use the word "ought" not as indicating lack of jurisdiction but as indicating what would have been the proper practice.

(1) 109 J.P. 201; [1945] 2 All E.R. 175; [1945] K.B. 502.

(2) 128 J.P. 516; [1964] 3 All E.R. 12; [1965] 1 Q.B. 89.

In the event it seems to me that what has happened is that the justices did wrong to hear this second summons through. They ought never to have been asked to hear it at all, and they ought to have stopped it as soon as they knew that there was no further evidence to be led. That being the position, it must, I think, be right to set aside their decision, leaving the original decision outstanding. Perhaps I should mention by way of caveat that the position might be different if the course of the evidence at the second hearing involved something in the nature of perjury at the first hearing, but there is nothing of that kind. The justices on the second occasion merely say: "We were not completely convinced by the evidence of either party", and they base their decision on the presumption that the children of the parties to a marriage are legitimate.

It is not necessary for me to make any comment on the third ground of appeal, namely, that the decision of the justices was against the weight of the evidence.

I propose for the reasons which I have given to allow this appeal.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray for Maule, Sons & Winter, Huntingdon.*

R.D.H.O.

QUEEN'S BENCH DIVISION

(LORD PARKER, C.J., MELFORD STEVENSON AND COOKE, JJ.)

R. v. MIDDLETON AND OTHER JUSTICES. *Ex parte* COLLINS

July 6, 29, 1969

Magistrates—Jurisdiction—Excess—Certiorari—Conviction and disqualification for holding driving licence quashed—Ancillary relief—Subsequent convictions for driving while disqualified quashed.

The applicant was convicted of motoring offences and disqualified for holding a licence for twelve months. It was not disputed that the justices had acted in excess of jurisdiction and that the conviction and order for disqualification must be quashed. During the period of disqualification the applicant pleaded guilty to driving while disqualified and was disqualified for a further five years. During that period he pleaded guilty to driving while disqualified and was disqualified for a further period of five years.

HELD: a court must have inherent jurisdiction to give such ancillary relief as will make its orders truly effective, and certiorari must issue to quash the second and third disqualifications as well as the first.

MOTIONS by Roy Albert Collins for orders of certiorari to bring up and quash (i) an order made by Middleton, Lancashire, justices, on 1st June 1964 that he should be disqualified for holding a driving licence for a period of 12 months; (ii) decisions made by Bromley, Kent, justices on 29th January 1965, that he had driven a motor vehicle while disqualified and without insurance it being then ordered that he should be disqualified for a further period of five years, such period to run consecutively the period mentioned in para (i); and (iii) decisions made by Bexley justices on 13th May 1968 that he had driven a motor vehicle whilst disqualified and without insurance, he being then disqualified for a further period of five years to run consecutively to that imposed under para. (ii).

K. T. Simpson for the applicant.

M. D. L. Worsley for the respondents.

Cur. adv. vult.

29th July. **LORD PARKER, C.J.:** in these proceedings counsel moves on behalf of the applicant, one Mr. Roy Albert Collins, for relief by way of prerogative orders of certiorari in the following circumstances. On 21st March 1964 the applicant was driving his motor car when it became involved in a collision with another car. In the result he was charged with driving his motor car without due care and attention and with failing to stop after an accident. On 1st June 1964 the justices for the borough of Middleton in the county of Lancaster imposed fines and disqualified the applicant from driving for a period of 12 months. In the belief that he had been validly convicted and disqualified the applicant on 29th January 1965 pleaded guilty before justices sitting at Bromley of driving whilst disqualified and without insurance and he was then disqualified for a further period of five years, such period to run consecutively to the above-mentioned period of 12 months. Further on 27th May 1968 the applicant again pleaded guilty, this time before justices for the borough of Bexley, of driving whilst disqualified and without insurance and as a result was again disqualified for a period of five years, such period to run consecutively to the above-mentioned period of five years. It was not until September or October 1968 that the applicant sought legal advice and now as a result of enquiries that have been made he has ascertained, what is now conceded by the respondents, that his original conviction and disqualification by the justices for the borough of Middleton were invalid for reasons into which it is unnecessary to go. It is sufficient to say that they clearly acted in excess of jurisdiction. Indeed, counsel for the respondents has conceded that, subject to the necessary extension of time which the court has granted, an order of certiorari should issue to quash that conviction and disqualification.

The only point in this case concerns the question whether orders of certiorari should not also go to quash the decisions of the Bromley justices and the Bexley justices whose convictions were based on the supposition that the original disqualification by the Middleton justices was valid. Counsel for the applicant has submitted that orders of certiorari can and should be made to quash those two convictions and he refers to *R. v. West Kent Quarter Sessions Appeal Committee, Ex p. Files* (1), where **LORD GODDARD, C.J.**, envisaged the possibility that certiorari might lie to quash a decision in which an accused had pleaded guilty under some genuine misapprehension. Counsel referred also to *R. v. King's Lynn Justices, Ex p. Fysh* (2) which again suggested that certiorari might lie if it were established to the satisfaction of the court that a plea of guilty had been made under a genuine misapprehension.

Counsel for the respondents, on the other hand, submits that both the Bromley justices and the Bexley justices were acting within their jurisdiction and that on general principles this court cannot therefore interfere. In particular he refers to the classic opinion of **LORD SUMNER** in *R. v. Nat Bell Liquors, Ltd.* (3) in which the distinction is drawn between wrongful usurpation of jurisdiction by a magistrate and a case where he goes wrong, whether in fact or law, when acting within his jurisdiction. Moreover, he points out that none of the other well-known principles on which certiorari will issue, such as on the ground of an error of law on the fact of the record, bias, fraud, or for the failure to observe the rules of natural justice, apply in the present case. For my part I approach this question from a different angle. It seems to me that any court must have inherent jurisdiction to give such ancillary relief as will make its orders truly

(1) 115 J.P. 522; [1951] 2 All E.R. 728.

(2) [1964] Crim. L.R. 143.

(3) [1922] All E.R. Rep. 335, [1922] A.C. 128.

effective. In the present case it is conceded that the Middleton justices acted without jurisdiction and that accordingly their conviction and disqualification must be quashed by an order of certiorari. It follows that if at the time it had been realised that those proceedings were a nullity the subsequent orders of the Bromley and Bexley justices would not and could not have been made. Unless ancillary relief is given to quash those orders the order of certiorari to quash the decision of the Middleton justices will be for all practical purposes of no effect. The Bromley and Bexley justices are both courts amenable to orders of certiorari and in those circumstances I think that by way of ancillary relief orders of certiorari should issue to quash their decisions. Support for the proposition that certiorari can be used to give ancillary relief is to be found in *R. v. Wilson* (1) and in *McVittie v. Marsden* (2). It is moreover to be borne in mind that unless the court has power to do this, justice cannot be done. Once the applicant pleaded guilty before the Bromley and Bexley justices his only appeal to quarter sessions is limited to an appeal against sentence. Even therefore should he obtain leave to appeal to quarter sessions out of time they could not interfere with his conviction before the Middleton justices which would remain on his record for all time subject only of course to the exercise of the prerogative. Accordingly I would grant the applicant the relief claimed.

MELFORD STEVENSON, J.: I agree.

LORD PARKER, C.J.: COOKE, J., asked me to say that he also agrees.

Orders for certiorari.

Solicitors: *F. A. Tickner & Co.*, Bexleyheath; *Solicitor, Metropolitan Police.*

T.R.F.B.

(1) (1835), 3 Ad. & El. 817; 111 E.R. 624.

(2) 81 J.P. 109; [1916-17] All E.R. Rep. 1082; [1917] 2 K.B. 878.

COURT OF APPEAL (CRIMINAL DIVISION)

(LORD PARKER, C.J., WALLER AND O'CONNOR, JJ.)

July 31, 1969

R. v. RAISIS

Criminal Law—Sentence—Consecutive sentences—Sentence to detention centre—Consecutive sentence of imprisonment—Wrong principle—Sentences made concurrent.

It is wrong in principle to make a sentence of imprisonment consecutive to a sentence of detention in a detention centre. Where a sentence of imprisonment is passed on an offender who is serving a period of detention in a detention centre which has not yet expired, the sentence should be made concurrent so that the offender will go straight to prison.

APPLICATION by Nicholas Raisis for leave to appeal against sentence after refusal of leave by the single judge.

No counsel appeared.

LORD PARKER, C.J., delivered the judgment of the court: At the City of Cardiff Sessions on 8th January 1969 the applicant pleaded guilty to two counts of burglary for which he was sentenced to 18 months' imprisonment

concurrent on each count, and also to taking and driving away a motor vehicle for which he received three months' consecutive. Six other cases were taken into consideration and the total sentence, accordingly, was one of 21 months. It is against that sentence that he now seeks leave to appeal after refusal by the single judge.

What happened was that on 6th November 1968 the applicant and three others took a car in Cardiff for the purpose of stealing some colour television sets. They broke into two flats, took two sets and were discovered while attempting to carry one of them out of the house. They dropped this and ran and the second set was found at the bottom of the garden. The offences taken into consideration were two offences of breaking and entering and four offences of stealing involving property valued at some £132.

The applicant is 21 and he has for his age an extremely bad record. He has been convicted on nine occasions of offences of larceny, wilful damage, shop-breaking with intent, taking and driving away and motoring offences. He has been conditionally discharged, put on probation and he has been sent to a detention centre. Indeed one wonders when one sees his record that he never was sentenced while under 21 to Borstal training; he certainly deserved it. However, he is now 21 and was sentenced to 21 months, and no one can possibly say that in his case 21 months was in any way excessive.

The matter, however, does not end there because he had been sentenced to six months in a detention centre on 21st November 1968. That sentence was still running therefore when the sentence of 21 months' imprisonment was passed and the deputy recorder in those circumstances made the 21 months' imprisonment consecutive to the unexpired portion of the detention centre sentence. The court has come to the conclusion that it is wrong in principle to make a prison sentence consecutive to detention in a detention centre. In this case there would, allowing for remission, have been about two months when the prison sentence was passed during which detention would still continue. Accordingly the result would be and presumably has been, because this is past history, that he continued to do two months in the detention centre before he went to prison.

The court thinks that the proper course in those circumstances would have been to make the 21 months' imprisonment concurrent rather than consecutive in the sense that the unexpired portion of the detention would then merge in the prison sentence and he would go straight to prison. Accordingly, in order to correct that this court will grant leave to appeal against sentence, treat this as the hearing of the appeal, allow the appeal and delete the reference to the 21 months being consecutive.

Sentence varied.

T.R.F.B.



HOUSE OF LORDS

(LORD REID, LORD GUEST, VISCOUNT DILHORNE, LORD DONOVAN AND LORD PEARSON)

June 23, 24, 25, October 8, 1969

BARNES v. HAMPSHIRE COUNTY COUNCIL

Education—Local authority—Negligence—Child aged five years—Mother informed of time leaving school at end of day—Child released earlier without notice to mother—Injured in traffic accident while walking home alone.

At a school conducted by the respondents as local education authority, which was attended by the appellant, a girl aged five years and two and a half months, there was a procedure devised for the protection of children of the appellant's age from danger from traffic when they left school in the afternoon. The end of school hours was fixed at 3.30 p.m., and the mothers were told that they should be outside the school at that time to meet their children. When 3.30 p.m. arrived a teacher would lead the children across the playground and open the gate leading to the street to enable the children to join their mothers or other persons sent to meet them. On the day when the accident occurred which gave rise to the present action the children were released at or about 3.25 p.m. As a result the appellant's mother had not arrived to take charge of her when she left the school grounds, the appellant started to walk home alone, and, trying to cross a main road near the school, was knocked down and injured by a lorry.

HELD: the respondents were liable for negligence on the part of their servants, the teachers responsible, in releasing the appellant from the school before the customary time without notice to the appellant's mother.

APPEAL by Sandra Lesley Barnes (an infant suing by Leslie Frederick Barnes her father and next friend) from an order of the Court of Appeal dismissing her appeal from a decision of PARK, J., at Winchester Assizes rejecting her claim for damages for negligence against the respondents, Hampshire County Council.

The following statement of the facts is taken from the opinion of LORD PEARSON: The infant appellant was seriously injured in a road accident which occurred at Chandlers Ford, Hampshire, when she attempted to run across a narrow and busy main road and ran into a lorry. The driver of the lorry was in no way to blame for the accident. On behalf of the appellant it is claimed that the accident was caused by negligence on the part of the respondents, the Hampshire County Council, as the education authority responsible for the school concerned. At the trial there were two main contentions on behalf of the appellant, namely: (i) that the respondents had a defective system for releasing the children at the end of the afternoon session, in that the children were allowed to walk out of the school gate without having been first "paired off" with their waiting mothers or other persons coming to meet them, and this defect in the system caused the accident; and (ii) that there was negligence on this occasion by allowing the children to leave the school premises before 3.30 p.m., which was the proper finishing time for the afternoon session, and this premature release of the children caused the accident. As to the first contention, there was evidence from a number of witnesses at the trial that it would have been impracticable to operate a "pairing-off" system in the manner suggested, and the judge so decided, and his decision on this point has not been attacked in this appeal. Accordingly, the first contention has been abandoned, and it is only the second contention that is now relied on. The evidence relating to the way in which the children were released at the end of the afternoon session is now relevant only insofar as it bears on the second contention, which is that the premature release constituted negligence and caused the accident.

The main road on which the accident happened is the A33 running between Winchester and Southampton. When it passes through Chandlers Ford it is on the average only a little over 20 feet in width, there is a pavement on either side, and the speed limit is 30 miles per hour. It carries a heavy volume of traffic and is a dangerous road for young schoolchildren.

Sandra, the appellant, was only five years and two and a half months old at the time of the accident. She had gone to school for the first time on 8th May 1962, one month before the accident. She lived at Fryern Close, where she would not have much experience of traffic. That is east of the main road, and the school is west of the main road. The main part of the school where children who are six years old or over are taught, is between King's Road and Kingsway, and the annexe, where five year old children are taught, is at the far end of Kingsway. King's Road is a made-up road, but Kingsway is a lane and not made-up. Exact distances have been agreed, expressed in feet, and for convenience I will convert them into distances in yards to the nearest yard. A person walking from the annexe, where the appellant went to school, to the appellant's home in Fryern Close would on coming out of the gate of the annexe turn left and walk down Kingsway past the main school and along a short stretch of King's Road to the main road. The distance from the gate of the annexe to the junction of King's Road with the main road is 172 yards. Then the person would have to turn left and walk along the main road for more than a quarter of a mile (472 yards) to the junction of the main road with Oak Mount Road, and then turn right and walk for a distance of 402 yards via Oak Mount Road to Fryern Close. The total distance is well over half a mile (about 1,046 yards). The main road would have to be crossed.

At the annexe there were two teachers, and the number of children, all of whom were five years of age, would normally be about 80, although on the day of the accident an outbreak of measles had reduced the number to about 65. There was a usual procedure for the release of the children at the end of the afternoon session. According to the evidence of some of the parents, there might be deviations from this procedure, but such deviations, if they occurred, would not be material to the issue in this appeal. When the children were ready to go home, the door of the school building would be opened, and the children would be led across the playground to the gate, which would be opened by one of the teachers. About 20 of the children were to be taken home in the school bus; these children would form up in a "crocodile" and be led by one of the teachers down Kingsway to the gate of the main school, where the bus would be waiting. The remainder of the children would pass out through the gate of the annexe under the supervision of the other teacher. Most of these children would be met by their mothers outside the gates of the annexe. In speaking of "mothers" I mean to include other persons coming to collect the children. A few of the children, say five or six, would habitually not be met and would go home on their own. Also some mothers waited at the end of Kingsway or in cars in King's Road. The teacher standing at the gate of the annexe did not try to operate any "pairing-off" system; a child would not be kept in the playground until it was ascertained that the mother had come to collect the child. As I have said above, it is not contended in this appeal that there should have been a "pairing-off" system. The children had been duly instructed in matters of road safety. Also they had been told that, if a child was expecting to be met but could not find the mother, the child was to come back to the teacher in the playground, and children did sometimes come back accordingly. There would be on every afternoon at the school-leaving time a school crossing

patrol warden on duty in the main road at the point where it was joined by King's Road. He would collect a group of mothers and children and then hold up the traffic and "shepherd" them across the main road.

PARK, J., gave judgment for the respondents and his decision was upheld by a majority of the Court of Appeal (DIPLOCK, L.J., and GOFF, J.). LORD DENNING, M.R., dissenting, held that the school authorities were negligent in letting the children out too early.

Desmond Ackner, Q.C., McCreery, Q.C., and B. R. O. Carter for the appellant.
Fay, Q.C., and I. A. Kennedy for the respondents.

Their Lordships took time for consideration.

8th October. The following opinions were delivered.

LORD REID: For the reasons given by my noble and learned friend, LORD PEARSON, I would allow this appeal.

LORD GUEST: I have very little to add to the dissenting opinion of LORD DENNING, M.R., in the Court of Appeal, expressed with his usual lucidity and in terms with which I entirely agree.

The attack on the respondents' system of dealing with the infant children at the close of the afternoon session at Chandlers Ford Infant School necessarily failed. The system suggested of "pairing off" individual children with their respective parents, before they were released outside the school gates, while no doubt an ideal procedure, was quite impracticable in the circumstances. Moreover, it was not adopted in any other schools. The system in vogue at Chandlers Ford, which was for those mothers who wished to collect their children to wait outside the school gates at 3.30 p.m. when the children were let out of school, was reasonably safe provided it was operated properly. But this system did of necessity require fairly close timing on the part of both the mothers, or their deputies, and the school authority. If a mother who wished to accompany her child home was late, she ran the risk of the child wandering off unattended. On the other hand, if the school "closed" early there was a similar risk to the child. The standard of care for the school authorities was to take such care of the children as a reasonably careful parent would do. Most parents showed their standard by appearing at the school gates promptly at or before 3.30 p.m. to collect their children.

On the occasion in question the accident to the appellant happened at 3.29 p.m., on the main A.33 Winchester Road, a distance of 250 yards from the school gates. I see no reason to differ from the learned judge's finding that the appellant was released from school at 3.25 p.m. The trial judge did not regard this as negligence on the part of the teachers. This seems, with respect, to be in conflict with Mr. Potter's evidence—he was the respondents' deputy education officer—that breaking point when the children might become bored and wander away would come after five or six minutes' waiting. He also said that if the children were released five or six minutes early they were placing a far greater strain on the parents than they ought to. The school gates were only 170 yards distant from the main road and a child walking at the slow speed of two miles per hour would reach the main road in just under three minutes. The main road carried a heavy volume of traffic. In my view, having regard to all the circumstances, particularly the age (five years and two months) and the disposition of the child, which was said to be unpredictable, and the proximity to the main road, it was

not an acceptable risk to release the children at 3.25 p.m. when the parents knew that the time for release was 3.30 p.m.

Where I find myself in disagreement with the views of the majority of the Court of Appeal is with DIPLOCK, L.J., when he said that the time of the release was a question of degree. If the release had come at 3.28 or perhaps 3.29 p.m., it may be that this could be characterised as a question of degree but a matter of five minutes early does not, in my view, fall within that ambit.

Broadly for the reasons expressed by LORD DENNING, M.R., I would allow the appeal and deal with the case in the way suggested by my noble and learned friend, LORD PEARSON.

VISCOUNT DILHORNE: The facts in this case are fully stated by my noble and learned friend, LORD PEARSON, and there is no need for me to repeat them. In the statement of claim negligence on the part of the respondents was alleged on two grounds: (i) in failing to ensure that the pupils at the annexe, of whom the appellant was one, were not allowed to leave the school "unless and until they were collected therefrom by parents or other responsible persons"; and (ii) in failing to prevent the appellant from leaving the annexe when it was known, or ought to have been known, that neither her mother nor any other responsible person was there to collect her. School was supposed to end at 3.30 p.m., and it was alleged that she was released from school by her teacher at or about 3.15 p.m.

In the defence delivered on 16th June 1964, the respondents alleged that she had been let out of school at, or very shortly after, 3.30 p.m., and said that they would deliver particulars of the arrangements maintained by them for the children leaving the annexe after school. Those particulars were delivered on 25th November 1964. The material parts read as follows:

"(b) The principal teacher at the said school made the arrangements for the children leaving school which are set out at (c) below . . . (c) The arrangements made were as follows: As school ended, of the two teachers at the annexe, one took such children as were to go on the school bus to the main school while the other remained in the playground to supervise the rest of the children. Certain of such children were by their parents' wish allowed to leave school on their own, the remainder were required to remain in the playground until the persons who were to take them home arrived."

Under these arrangements the appellant should have remained in the playground until her mother arrived to take her home. There was thus on the pleadings no issue as to arrangements that the respondents should have made.

At the hearing the principal teacher of the school in examination-in-chief said that the children remained in the playground until their parents arrived. "They were" she said "not allowed through the gate until the parent is just outside". She was followed in the witness box by the two teachers at the annexe. They said that a different system from that stated in the particulars and deposed to by the principal teacher had been followed; that the children who were to be met were allowed out of the playground to meet their parents, and that they were told that, if their parents were not there, they were to return to and wait in the playground. The next day the principal teacher was recalled. She said that she had been confused when she gave her evidence, that she had had nine years' experience in a nursery school and that the practice there was to hand over each child to a parent, "pairing off" as it was called. She also said that she had never given instructions to the two teachers to do that.

A considerable number of witnesses, headmasters and others, were called by the respondents. They said that the system which the two teachers said was followed was a satisfactory one. It was said that a pairing off system was "just impossible" and "not feasible", although why a system feasible at a nursery school for children under five should become not feasible and impossible when a child reaches five and goes to an infant school, and why the respondents should have given particulars of arrangements which at the trial it was asserted were not feasible or possible, is not clear to me. The system which the two teachers said was followed involved the risk that a child let out of school and who was not met would disobey or forget the instructions given to her and not return to the playground but seek to make her way home on her own.

Nevertheless, in the light of the evidence called by the respondents, PARK, J., held that the system which the two teachers said was followed was satisfactory. LORD DENNING, M.R., in the Court of Appeal said that he did not think that they could upset that finding, and in this House it was not sought to challenge it. LORD DENNING, M.R., said that speaking for himself he could not think the system satisfactory. I am inclined to agree with him, for I doubt very much whether a system which permits of the release of a five-year-old from school without supervision while looking for a parent, with the risk that the child will try to go home on its own, can be described as satisfactory. It should not, I think, be assumed that PARK, J.'s finding is necessarily one which will be followed should this system again come under consideration.

The main contest in relation to the second ground on which negligence was alleged was as to the time when the appellant was released from school. The two teachers swore positively that the children did not leave until 3.30 p.m., when it was the parents' responsibility to meet them and the responsibility of the school authorities ceased. Mr. Potter, the deputy education officer for Hampshire, was asked whether, if it were the fact that the children were released before the appropriate time that day, he would seek to excuse the teachers responsible. He said: "No, I should say we should not release children before the appointed time". At the end of the hearing on 6th July 1967, PARK, J., said that on the evidence he was not satisfied that the children were let out early "and if they were, it was nothing more than a minute".

Then evidence was found which established the time of the accident, and on 14th July this evidence was called. A Mr. Procter working in his garden heard a noise from the road, so he went down his drive, saw that a girl was hurt and ran back and telephoned for an ambulance. His telephone call was recorded in the telephone exchange as received at 3.30 p.m. In the light of this evidence PARK, J., held that it was probable that the appellant was knocked down at 3.29 p.m.

The place where the accident happened was 253 yards from the gate to the annexe. If she was knocked down at 3.29 p.m., she must have left the school appreciably before that time. She passed a bus stop on the corner of King's Road and the main road where a Mrs. Munro was standing with her young child whom she had collected from the school. PARK, J., thought that it was probable that Mrs. Munro had walked quickly to the bus stop and estimated that it had taken her $2\frac{1}{2}$ minutes to do so and that the appellant had passed her half a minute later. He said that—

"it would indicate that the children were released from the annexe, at the earliest, at about 3.25 p.m."

I do not understand why he said "at the earliest". It would seem to me that the appellant cannot have been released from school later than that time. If

Mrs. Munro walked slower than the judge held probable, she must have been released earlier. But whether the appellant was released at about 3.25 p.m., or before then does not, in my opinion, matter.

At the hearing it was accepted that the school was responsible for her until 3.30 p.m. It was accepted that it was extremely unsafe for a little girl of five to go alone to the main road, and, in my view, once it was established that she must have been released in sufficient time before 3.30 p.m. for her not only to get to the main road but also 81 yards along it, it followed that the respondents were guilty of negligence. As LORD DENNING, M.R., said: "You would have thought that at this point the case of the school authority broke down completely". I think that it did, despite the evidence given by Mr. Potter, when he was recalled after the evidence as to the time of the telephone call for the ambulance had been given, to the effect that it was permissible for the school authorities to release the children up to five minutes before the school was supposed to end.

Throughout the hearing the respondents' evidence showed the importance attached to release at 3.30 p.m., and not before, and recognition of the fact that it was not until that time that their responsibility came to an end. No doubt they would not be held to blame for an error in releasing the children a few seconds or even a minute or so before that time, but to release them five minutes or, as I think, possibly more than that, before the school was supposed to end and before parents would expect their children to be released cannot, I think, be regarded otherwise than as a breach of duty on their part in consequence of which the appellant sustained serious injuries.

For these reasons in my opinion the appeal should be allowed, and judgment entered for the appellant for £10,000, the sum now agreed as damages, with costs as agreed.

LORD DONOVAN: I need not repeat the facts. They are set out in detail in the opinion of my noble and learned friend, LORD PEARSON, with which I agree, and to which I need add but little.

In the matter of handing these five years old children over to their parents or some other responsible adult at the close of the day, I think that a reasonably safe system was in force at this school. Its situation did not call for confining the children in the playground or in the school until each one was collected. That being so, I do not see how one teacher, in charge of 40 children, could cope with the physical task of properly pairing off each one and preventing each child leaving until she had done so. The situation was dealt with by fixing the end of school hours at 3.30 p.m., telling the mothers they must be there at the school to meet their children at that hour or make some arrangement for someone else to do so, and telling the child to return to the teacher if it were not met. But since children of this age are admittedly unpredictable, so that a five-year-old might well disobey or forget this injunction to return to teacher, and instead begin to toddle off home on its own, it was essential to stick to the timetable. Here, on this day, this was not done.

It is now admitted that the children were let out of school four or five minutes early, and that the appellant was knocked down and injured on the main road at a point some 250 yards from the school gate at a time still within school hours, i.e., at about 3.29 p.m. Because the children were let out only a few minutes early, it is contended by the respondents that this is all a matter of degree, that teachers cannot be expected to carry exact chronometers, and that in the circumstances the decision of the trial judge in their favour ought not to be disturbed.

It seems, on the evidence, that considerable care was taken in the school to ensure that proceedings were ordered according to the right time. The school caretaker testified that he kept the school clock to time every morning and afternoon, checking it against his watch, which he checked in turn against the "pips" on the radio, for which he listened. There was also a clock in the annexe to the school (where the infant appellant was) and this, too, was "always" checked. The clock in the school governed the time when a bell was rung at the end of the school session. One of the two school teachers concerned said that she and her colleague compared their watches and released the children when it was 3.30 p.m. School never stopped before that time. The headmistress of this infants' school also insisted that school never closed early, and in fact closed a few minutes late on the day of the accident. The school caretaker supported this evidence.

When these witnesses were confounded by the subsequent testimony which proved that the children were let out at least four minutes too soon, no suggestion was made that this resulted because the school clocks, or the teachers' watches, being less accurate than chronometers, were unfortunately fast that day; and the conclusion seems inevitable that the children were released at a time which the teachers either knew, or could have known, was before 3.30 p.m. There may have been an understandable inclination to grant this indulgence on what was the last day before the Whitsun break.

Unfortunately the few minutes in question were enough to allow this child to proceed alone 170 yards to the main road, walk up it for a further 80 yards, and then dart across the road into the side of a moving lorry. Presenting the child with the opportunity of doing this destroys the argument about her premature release being a matter of degree. I agree with LORD DENNING, M.R., that it establishes negligence; and I would therefore allow the appeal and give judgment for the appellant for the damages and costs which the parties have now agreed.

LORD PEARSON stated the facts as set out above and continued: In the ordinary course of events, the children being released at the end of the afternoon session at the official time, which was 3.30 p.m., there would be a risk that a child expecting to be met would not be met because the mother was late or unexpectedly prevented from coming; and the child, having walked along Kingsway, would, instead of obeying the instructions to report back to the teacher, decide to continue on the homeward journey and would enter the dangerous main road; and then the child, not knowing or forgetting that the safe place to cross was at the school crossing under the supervision of the crossing patrol warden, would go further along the main road and try to dart across it and be knocked down and injured. There would be that risk, but in all the circumstances it would not be a great risk, and it can be assumed for the purposes of this appeal that it was a necessary risk and could reasonably be taken.

The complaint against the respondents is that to the necessary risk they added on this occasion an unnecessary risk by releasing the children too early, and it was the additional and unnecessary risk which caused the accident. A simple illustration will show the nature of the additional risk. Be it assumed that the average speed of a five year old child—when running and skipping and dawdling are taken into account as well as walking—is about two miles per hour, and that the average speed of a mother bringing a younger child with her would be about the same. Then a child released from the annexe at 3.30 p.m. would be met before covering the distance of 172 yards and entering the dangerous main road, if the mother was on time or not more than about 2½ minutes late. But a

child released from the annexe at 3.25 p.m. would not be met before entering the dangerous main road, if the mother was on time but not so much as 2½ minutes early.

The judge considered very carefully the evidence as to the times, and his main findings, fully justified by the evidence, were that (i) the children were released from the annexe at or very shortly after 3.25 p.m.; (ii) the time at which the appellant, having made the journey from the annexe to the main road and passed the school crossing place and walked about 80 yards up the main road, attempted to run across the main road and ran into the lorry and was knocked down and injured was about 3.29 p.m.; (iii) the mother arrived at the scene of the accident at about 3.31 p.m. and therefore probably she would have met the appellant before the appellant entered the main road, if the appellant had been released from the annexe at 3.30 p.m., the official time. It follows that on a balance of probabilities the premature release of the children by the respondents was a cause of the accident.

There remains the question whether the premature release of the children constituted negligence on the part of the respondents. As a matter of first impression I would say that of course it was negligent, because it added an unnecessary risk and was unfair to the mothers and the children. The mothers might fairly be held responsible for the safety of the children after 3.30 p.m., when the school's responsibility would for most purposes, subject to emergencies and special arrangements, come to an end. But why should a mother, who had so timed her journey that she would reach the school gates at 3.30 p.m. (or shortly before or shortly after that time), have to find her child already on the dangerous main road? The difference in time between about 3.25 p.m. and 3.30 p.m. is not trivial; it cannot be disregarded under the *de minimis* principle.

I should, however, refer to the evidence and the curious course of events at the trial, which was in two stages. The first stage took place on 4th, 5th and 6th July 1967. Although there was some evidence from the appellant's witnesses of the children being released too early on the day of the accident, the respondents' witnesses believed that the children were in fact released at 3.30 p.m. on that day and gave their evidence on that basis. A witness, who was one of the teachers at the annexe on that day, said that the children emerged just a second before 3.30 p.m. from the doorway. She agreed that the main road is a very dangerous road, particularly on a Friday; and that it would be quite unsafe to let a child of five on that road by itself, even if the child had had instruction in road safety; and it would still be unsafe to let the child on the road alone even if it had been told that it ought only to cross where the crossing keeper was on duty, because a child of that age cannot be trusted to cross only where the crossing keeper is; and that the appellant was a normal spirited child and as unpredictable as any other five year old. She said, referring to the appellant:

"She is my responsibility until half past three... by half past three I expect the mother to be there."

She said: "We never left before half past three ever". She was asked in re-examination: "Had you any instructions what was your duty about dismissing the children?" She replied: "I was to make sure it was half past three." She was asked:

"Does that mean that if you had dismissed them and turned them out before half past three you would have been disobeying your instructions?"

She said "Yes".

The witness who was the other teacher at the annexe on the day of the accident said that the school went out at 3.30 p.m. She agreed that the main road "could be a death trap" for little children, and no five-years-old child of the annexe should be allowed on that road by herself, and such a child could not be trusted, if it did get on that road alone, to cross only where the crossing keeper was, and that such a child is unpredictable. She said: "School finishes at half past three, and my responsibility finishes at half past three". She said that some parents waited at the end of the lane for their children, and some of them in cars. She said: "School never stopped before three-thirty", and "I always looked at my watch before releasing the children at the end of the day. I was most particular". In re-examination she said:

"I think the duty of every parent is to be at the gate at half past three to meet the child... They know the school finishes at half past three and it is their duty to be there."

Four parents were called as witnesses for the defence. They thought that the children had not been released early on the day of the accident. Some of them expressed opinions as to the extent of the teachers' responsibility. One said:

"They had the duty to see that they were out at the right time, which they always were. They had a duty to see that they walked across and out of the gate at a reasonable time. If you personally asked a teacher to look after a child on a specific day, I am sure they would have done this, but I did not feel they had any duty at all to see to the child after school hours."

Another said:

"Well, of course, these things do happen as it did happen, but I still cannot see that the teacher should be blamed at all since they came out at the right time."

Evidence was also given by three headmasters and a former headmistress. Their evidence was directed mainly to the question whether a "pairing-off" system would be practicable, and they concurred in saying that there was no such system in their experience and it would not be practicable. They were not asked about the children being let out early from school. One of them said:

"I think it is a very good thing that the children should be encouraged to become independent as soon as is reasonable."

Another said:

"In my experience there has never been any doubt that it has been the parents' responsibility to see either that the child was accompanied or that the child went home alone and that the parents made that decision."

The last witness for the defence at this stage was the deputy education officer for Hampshire. He also said that pairing-off would be impracticable. He said:

"It is accepted by parents that they have two responsibilities, both to see the child to and from school, and, I think, to make arrangements that if anything detains them the child knows what to do—rather to arrange for the child to go to and from school, not necessarily to conduct them. This is their decision."

He was asked the question:

"If it be the fact that those children were released before the appropriate time on this particular day, would you seek to excuse the teachers responsible?"

He answered: "No, I should say we should not release children before the appointed time."

At the end of the evidence the judge said he was not satisfied on the evidence he had heard that the children were let out early. After the speeches he reserved judgment. But then enquiries were made and witnesses were found whose evidence would show with some exactness when the accident happened. On application their evidence was allowed to be adduced. One of them was a young man who was working in a garden, heard the thud of an accident, went to the gate and saw the child lying on the road, and then went back to the house, dialled 999 and asked for the ambulance service. Other witnesses, speaking of the times when the call was received and put through, were a supervisor at the telephone exchange and the chief controller of the ambulance service. In consequence of their evidence the judge made his findings as to the material times, to which I have referred, putting the time of the accident at 3.29 p.m., and the time of the release of the children from the annexe at or very shortly after, 3.25 p.m.

The deputy education officer for Hampshire was then recalled. With regard to his previous answer to the effect that he would not defend letting the children out early, he explained that he was thinking of the allegation on behalf of the appellant that they were let out a quarter of an hour early. He felt that the school authorities would be at fault if the children were let out so early that the period would be too long for the children to wait, and breaking point would come certainly after five minutes, but a waiting period up to five minutes would not be unreasonable. In cross-examination he was asked to consider release at 3.25 p.m., or two or three minutes earlier, and he answered:

"I should consider that we were at fault in releasing the child as early as that, and the degree of fault depends upon the degree of earliness."

It was then put to him that, if the child is released as much as five or six minutes early, the parents' arrangements cannot be expected to function properly, and he said "We are placing a much heavier strain on them than I think we ought to".

The judge held that the two mistresses were not negligent in letting the children out of the annexe at or soon after 3.25 p.m., but he did not explain why this breach of the system should not be considered to be negligence. The majority of the Court of Appeal held that it was a question of degree whether the early release of the children was sufficiently early to constitute negligence, and that in this case it was not. LORD DENNING, M.R., dissenting, held that the school authorities were at fault in letting the children out too early. He said:

"In this case the appointed time was 3.30 p.m. The evidence of the teachers themselves was explicit. They said it was the responsibility of the school to look after the children up to that time, and it was the parents' responsibility after that time . . . the parents cannot be expected to be there before the appointed time, and if the school release them [i.e., the children] early, five minutes early, they are releasing them into a situation of potential danger."

I agree with LORD DENNING, M.R. The system proved by the evidence was as he stated it. It was the duty of the school authorities not to release the children before the closing time. Although a premature release would very seldom cause

an accident, it foreseeably could, and in this case it did cause the accident to the appellant.

I would allow the appeal and direct that judgment be entered for the appellant for damages and costs in accordance with the terms of settlement which have now been agreed between the parties on the basis of the appeal being allowed. Those terms are as follows: (i) that the respondents will pay damages in the sum of £10,000; (ii) that the respondents will pay the appellant's costs to be taxed on solicitor and own client basis from the commencement of the action by writ of summons in the Winchester District Registry of the High Court of Justice (1964 B. No. 60) dated 17th April 1964, to include second leading counsel in the House of Lords.

Appeal allowed.

Solicitors: *Waterhouse & Co.*, for *Dutton, Gregory & Williams*, Winchester;
Theodore Goddard & Co., for *A. H. M. Smyth*, Winchester.

G.F.L.B.

COURT OF APPEAL (CIVIL DIVISION)

(SALMON, EDMUND DAVIES AND KARMINSKI, L.J.J.)

July 21, 1969

Re F. (R.) (an infant)

Adoption—Adoption order—Consent of mother dispensed with because she could not be found—Application by mother for extension of time to appeal—Inherent jurisdiction of Court of Appeal to grant extension of time and to remit case for re-hearing.

Where the court has dispensed with the consent to an adoption order of a mother on the ground that she could not be found and the order has become final, the Court of Appeal has an inherent jurisdiction to grant an extension of time for the mother to appeal, to set aside the adoption order, and to remit the matter for re-hearing on oral evidence. Extension of time for appealing against an adoption order would only be granted in very exceptional circumstances.

APPEAL by a mother for leave to appeal out of time against an order of Kingston-upon-Thames County Court for the adoption of an infant, her son, by the respondents.

P. W. Esling for the mother.

P. K. J. Thompson for the respondents.

SALMON, L.J.: In this case, the mother was married on 14th October 1961 and a boy was born on 25th October 1963. In June 1964, when the infant was only a few months old, the mother left the father, taking the infant with her, but in October 1964, when he was just about a year old, she brought him back to the father and left the infant with him. He was not able himself to look after the infant and handed him over to the respondents, who very kindly consented to take the infant over, and in fact became his foster parents. There the infant has been ever since. He has become extremely fond of them. The respondent Mrs. B., is the only mother that he has really ever known, and he regards the respondent Mr. B. for all practical purposes as his father. They are very fond of the infant and regard him as their child, and certainly have always treated him as such. For a time the mother paid sporadic visits to the infant

whilst he was with the respondents, but apparently the last time she saw him was in March 1965. This court has not formed any view why that was the last time she saw him. There may be or there may not be perfectly good explanations, but the fact is that she has not seen the infant for well over four years. She has been living and still lives with Mr. M. as his wife, by whom she has two children. The respondents were living in the west country. They moved from there to Hertfordshire, and from thence to Surrey, where they now reside. The respondents were very anxious to adopt the infant, and, according to them, from about 1965 or 1966 onwards they had no idea where the mother could be found. They took proceedings to adopt the infant, the father giving his consent.

Section 5 of the Adoption Act 1958 provides:

"(1) The court may dispense with any consent required by paragraph (a) of subsection (1) of section four of this Act [that, I may say, in this particular case would be a consent by the mother] if it is satisfied that the person whose consent is to be dispensed with—(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably. (2) If the court is satisfied that any person whose consent is required by the said paragraph (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in subsection (1) of this section . . ."

When the respondents applied to the county court, it occurred to them that, although they might well have grounds other than the ground that the mother could not be found, on which they could persuade the court to dispense with her consent it would be much better, rather than making an attack on the mother of the child whom they were about to adopt, to confine themselves to the ground that the mother could not be found. They wrote, or instructed their solicitors to write, to her last-known address, and the letter was returned "Gone away". They caused advertisements to be inserted in the press, notifying her of the proposed proceedings. They caused enquiries to be made from the post office and other sources in an attempt to trace her whereabouts, but all these steps proved to be fruitless. Accordingly, the matter came on before the learned county court judge on 20th February 1969, and, on the material before him, he made the only possible order that he could make, namely, an order for the adoption of the infant by the respondents. The mother, however, learnt for the first time of this adoption order in April 1969, and she wishes to have the custody of the infant and was shocked (so she says) by the news that an adoption order had been made in respect of him. She immediately applied for legal aid, but it took a little while to get, and she was unable to apply for leave to appeal from the adoption order until this month, and the matter accordingly now comes before us out of time.

The first question to consider is whether there ought to be any extension of time, whether there is any reasonable excuse for the delay, such as there was, in bringing on this application. For my part, I think that the facts that I have related, namely, that the mother did not hear of the order until last April and was not able to get legal aid until very recently, do excuse the delay, and I think that we should grant an extension of time. I would like to point out that, in cases of this kind, an extension is not granted lightly. The infant's interest has to be taken into account, and particularly what has happened since the date when the order was made and the date of the application. I am not laying down any general principle, but if some years had gone by, I think a very exceptional case would have to be made out for the court in its discretion to extend the time; but here

we are dealing with a delay of only a few months. So I would grant leave, and I think that my brothers concur that leave must be granted; indeed, we have heard the appeal.

The question arises what should be done now. The mother has filed an affidavit sworn by herself, to which I need not refer, and one by her father, and, if what is stated in her father's affidavit is correct, it appears that he has lived at his present address for 30 years, that both the respondents have known him, at any rate, since 1960 and visited him in 1961 and 1962 and then again in 1966, and according to him addressed a letter to him which he received in 1966. That is well before the adoption order was made. He says that it was apparent from what he told them that he was in touch with the mother. We are in no position to express any view whether or not the facts in that affidavit are correct, but, if they are correct, this is not a case where the mother could not be found, because the words in the section "cannot be found" must mean cannot be found by taking all reasonable steps. The respondents indubitably took many steps and very thorough steps to find the mother. If, however, it is true that they knew that the mother's father was in touch with the mother and that they knew his address, there is one reasonable step which they omitted to take, and that was to get in touch with her father and ask him to tell the mother what they proposed. When the matter comes before the judge, again, as in my view it ought to, he may consider that what her father says in his affidavit cannot be accepted, in whole or in part, but that is a matter of speculation.

Quite apart from the matter with which I have dealt, namely, her father's affidavit, here is the mother within a very short time of the adoption order coming forward and saying: "I want to be heard about the future of my child. An adoption order cannot be made without my consent except for certain reasons. I say there is no reason for making the order and I have not been given any chance of putting my case before the court which must adjudicate on these issues."

Counsel for the respondents during the course of the argument has contended very persuasively that this court has no power, having regard to the language of the Adoption Act 1958 and the County Court Rules, to do anything except dismiss this appeal. I am afraid that I do not agree with him. As EDMUND DAVIES, L.J., pointed out to counsel in the course of the argument, it would follow, if he were right, that even though the mother was on her way to the court to protest on the morning when the proceedings were held and had the misfortune to meet with a motor car accident or a train accident which prevented her from arriving and she came the next day, however strong her case was for keeping the infant, she would be debarred for ever. For my part, I am not prepared to accede to that argument. I think that this court has an inherent jurisdiction to remit a case of this kind when the mother has come forward in circumstances such as these, so that the whole of the matter may be reconsidered. We are here dealing with the future of a little child, and that is much too important to depend on any esoteric points of law or practice. I think that justice demands that we should set aside the learned judge's order, without in any way criticising the learned judge, because he made the only order possible on the material before him, and order that the matter should be reheard.

At the rehearing it will be open to the respondents, in addition to challenging the evidence of the mother's father, to put forward that the consent of the mother can be withheld because she has abandoned or neglected the infant or has persistently without reasonable cause failed to discharge the obligations of a parent of the infant, and, indeed, that she is unreasonably withholding her consent. I think that, having regard to the fact that this matter is being reheard,

the less I say the better, but it certainly must not be taken that, because I am in favour of giving the mother a chance of being heard, I am expressing any view that, in the end, it may not well turn out that the order that was made is the correct one and in the best interests of the infant. Nor am I seeking by what I have said in any way to proscribe any other grounds which the respondents may wish to put forward for dispensing with the mother's consent; and, naturally, the mother is free to put forward any reasons why her consent should not be dispensed with.

Although I feel confident that it is unnecessary in this particular county court to mention the matter, it is as well if I repeat what, unfortunately, this court has had to say on a number of occasions in relation to other county courts. Questions of this kind must not be decided on affidavit; it is vital to see the adoptive parents and the natural parent who is objecting, and vital to have reports from the welfare officer in relation to both the prospective homes. I would not like it to be thought that there was any necessity on the last occasion when this matter was before the county court judge to have had anything other than affidavit evidence, because on the only issue that was then germane, affidavit evidence was, of course, all that was required, but, on the issues which I imagine will now be before him, the position will be very different.

I regret that further time will be taken. I regret the anguish and anxiety which this decision must inevitably cause the respondents and the expense which will be involved, but this is a matter of the greatest possible importance, far more important than any litigation in which mere money is concerned. In my view, the right order to make here is that the adoption order shall be set aside and the matter remitted to the Kingston County Court for rehearing, and I can but express the hope that this matter will be heard at the soonest possible moment. I have no doubt at all that the learned county court judge will do his very best to hear the case within a matter of weeks.

EDMUND DAVIES, L.J.: This is a singularly unfortunate case, and it is said to involve a point of law hitherto not covered by authority. As to the application for leave to appeal out of time, I desire to say no more than that in all the circumstances I think that leave should be granted.

As to the other and more formidable matter, namely, whether the adoption order of 20th February 1969 should be set aside, in the forefront of the mother's grounds of appeal is the assertion that the respondents failed to take proper steps to serve her. On probing the matter with counsel for the mother, he made it clear that such a ground of appeal did not involve a complaint by the mother that the learned county court judge had come to a wrong decision on the material presented to him. On the contrary, counsel has been constrained to concede that the learned judge came to the only possible conclusion on the available material. "But", says counsel, "that is by no means the end of the story, for we desire to present to the court some further material which should lead to the conclusion that the learned county court judge, while acting properly within his rights, was nevertheless misled by not having the whole story told him. The mother of this child [and we have two affidavits on the point] could have been found had proper steps been taken. Had the county court judge been told that there was a lacuna in the efforts made by the respondents to trace the mother, he would in all probability not have made the order." On the other hand, counsel for the respondents has said: "That is quite immaterial. It matters not that the learned judge did not have all the material before him. As long as he came to a righteous conclusion on the then available evidence, that is the end of the story;

and the Court of Appeal is powerless, in such circumstances, to interfere with the order."

There is apparently no authority for the proposition advanced by counsel for the respondents. On the other hand, it is equally right to say that counsel for the mother has been unable to cite authority for the proposition that this court may re-open such an order as has been made in this case. But I share the perturbation of my brethren if the law were such that in no circumstances could an adoption order (made on material which appeared proper to the county court judge) be re-opened notwithstanding that within a reasonable period of time thereafter it was manifested that the whole tale was by no means told to him. SALMON, L.J., was good enough to refer to an instance that I put forward in the course of counsel's argument. Supposing that the learned county court judge had made his adoption order, having a short list, by, say, 11.0 a.m., and that the clerical staff in the county court office, also having an easy morning, had drawn up the adoption order by 12 noon, and the mother of the child, who was journeying to the county court to object to the making of an order, had been delayed on the way and arrived at the court at 12.30 p.m., she would find that the order had, of course, been made. In those circumstances, says counsel for the respondents, the Court of Appeal would have no power to interfere, none whatsoever. If the mother set in motion the wheels of the law the very next morning to try to get the order put aside, there would be no power in any court to do so.

All I can say is that I cannot think that our system of justice is so powerless as to be incapable of rectifying that position. I hold that we have the inherent power which counsel for the respondents denies that we possess, and, while I share fully the sympathy which has been extended to the respondents that a further period of anxiety lies ahead for them, I see no way out of ordering that this matter be remitted to the county court for further consideration. There will be an abundance of material which will, we know, receive the county court judge's most careful consideration. That which the mother is in a position to do for the infant will be one of the grounds. There are a number of cases cited in the COUNTY COURT PRACTICE on this matter which we are sure the county court judge will bear very much in mind. Like SALMON, L.J., I desire to give not the slightest hint of the way in which I think that I would decide this matter were it to come before me.

I concur that this appeal should be allowed, the adoption order set aside and the matter remitted to the learned county court judge for his reconsideration at as early a date as he can conveniently manage.

KARMINSKI, L.J.: I agree and desire, because this is a difficult and anxious case, to add only a very few observations of my own. The learned county court judge found, as he was bound to find on the evidence before him, that the mother could not be found. We know now that she has turned up and has taken quite energetic steps to give effect to her opposition to the infant being adopted. The scheme of the Adoption Act 1958 is that the consent of a parent is an essential ingredient in adoption. Section 4 sets that out. Section 5, which is the section which deals with the power to dispense with consent, sets out a number of reasons in respect of which the court may dispense with any consent required by the preceding section. One of the grounds is that one parent cannot be found, which is what was used in this case, but there are other grounds, to which I do not find it necessary or desirable to call attention here which may enable the court to dispense with consent.

I would agree at once with SALMON and EDMUND DAVIES, L.J.J., that we cannot, knowing very little about the facts of this case, express any sort of view on the

merits of this matter. But it seems to me, as to my brethren, that it would be wholly wrong to exclude from giving her evidence a mother who has not had a chance of coming before the court earlier. I found counsel for the respondents' argument on this court's jurisdiction interesting and, indeed, persuasive; but in the end I felt bound to reject it. The power of this court to hear an appeal on a matter of this kind must depend on its inherent jurisdiction. It would be, in my view, wholly wrong to say that, in a case of this kind, where we are dealing with an infant, this court has no jurisdiction to correct a mishap—I do not say an error—of the kind that has happened here.

I agree that this adoption order must be set aside. I agree to that order with the same regret as SALMON and EDMUND DAVIES, L.JJ. There must be a rehearing when no doubt oral evidence, as well as such documentary evidence as becomes available, will be before the learned county court judge.

Case remitted for rehearing.

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F.G.

END OF VOLUME 133.
